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1
2
3

4

5
6

7
8
9

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
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43
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92
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101
102
103
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106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
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127
128
129
130
131
132
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134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
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152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200

201

202

203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
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237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300

301

THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY.

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

**COURTS OF LAST RESORT
OF THE SEVERAL STATES.**

SELECTED, REPORTED, AND ANNOTATED

**By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."**

VOL. VI.

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AMERICAN STATE REPORTS.

VOL. VI.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
GEORGIA REPORTS. Vol. 78.	234-283
MAINE REPORTS. Vol. 80.	151-233
MARYLAND REPORTS. Vol. 68.	412-486
MICHIGAN REPORTS. Vol. 63.	284-341
MISSOURI REPORTS. Vol. 95.	17-83
NEW JERSEY EQUITY REPORTS. . . Vol. 44.	877-916
NEW YORK REPORTS. Vol. 110.	342-411
NORTH CAROLINA REPORTS. . . . Vols. 99, 100.	487-621
PENNSYLVANIA STATE REPORTS. . . Vols. 120, 121.	689-811
TENNESSEE REPORTS. Vol. 86.	812-876
VERMONT REPORTS. Vol. 60.	84-150
WEST VIRGINIA REPORTS. Vol. 29.	622-688



SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures

- ALABAMA. — (83) 3; (84) 5.
 ARKANSAS. — (48) 3; (49) 4.
 CALIFORNIA. — (72) 1; (73) 2; (74) 5.
 COLORADO. — (10) 3.
 CONNECTICUT. — (54) 1; (55) 3.
 DELAWARE. — (5 Houst.) 1.
 FLORIDA. — (22) 1.
 GEORGIA. — (76) 2; (77) 4; (78) 6.
 ILLINOIS. — (121) 2; (122) 3; (123) 5.
 INDIANA. — (112) 2; (113) 3; (114) 5.
 IOWA. — (72) 2; (73) 5.
 KANSAS. — (37) 1; (38) 5.
 KENTUCKY. — (83, 84) 4.
 LOUISIANA. — (39 La. Ann.) 4.
 MAINE. — (79) 1; (80) 6.
 MARYLAND. — (67) 1; (68) 6.
 MASSACHUSETTS. — (145) 1; (146) 4.
 MICHIGAN. — (60, 61) 1; (62) 4; (63) 6.
 MINNESOTA. — (36) 1; (37) 5.
 MISSOURI. — (92) 1; (93) 3; (94) 4; (95) 6.
 NEBRASKA. — (22) 3.
 NEVADA. — (19) 3.
 NEW JERSEY. — (43 N. J. Eq.) 3; (44 N. J. Eq.) 6.
 NEW YORK. — (107) 1; (108) 2; (109) 4; (110) 6.
 NORTH CAROLINA. — (97, 98) 2; (99, 100) 6.
 OHIO. — (45 Ohio St.) 4.
 OREGON. — (15) 3.
 PENNSYLVANIA. — (115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 6; (120, 121 Pa. St.) 6.
 RHODE ISLAND. — (15) 2.
 SOUTH CAROLINA. — (26) 4.
 TENNESSEE. — (85) 4; (86) 6.
 TEXAS. — (68) 2; (69; 24 Tex. App.) 5.
 VERMONT. — (60) 6.
 VIRGINIA. — (82) 3; (83) 5.
 WEST VIRGINIA. — (29) 6.
 WISCONSIN. — (69) 2; (70, 71) 5.

AMERICAN STATE REPORTS.

VOL. VI.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Adams v. Cowles.....	<i>Judgments.</i>	95 Mo. 501.....	74
Alley v. Caspari.....	<i>Jurisdiction.</i>	80 Mo. 234.....	178
Avery v. Everett.....	<i>Attainder</i>	110 N. Y. 317.....	308
Baltimore etc. Turnpike Co. v. Bateman.....	<i>Highways</i>	68 Md. 399.....	449
Barber's Administrator v. Bennett.....			
Bartlett v. Sparkman.....	<i>Evidence</i>	60 Vt. 602.....	141
Bell v. Mahn.....	<i>Agency</i>	95 Mo. 136.....	35
Bennett v. Morrison.....	<i>Theaters</i>	121 Pa. St. 225.....	786
Blake v. Flatley.....	<i>Effectment</i>	120 Pa. St. 390.....	711
Bliss v. Winslow.....	<i>Spec. performance</i>	44 N. J. Eq. 228.....	886
Bogges v. Lowrey.....	<i>Trover</i>	80 Mo. 274.....	195
Bourreseau v. Detroit Evening Journal Co.....	<i>Executions</i>	78 Ga. 539.....	279
Bradbury v. F. Ins. Ass'n of Eng. Same v. Norwich U. F. Ins. Soc. Same v. W. Assurance Co. Same v. Westchester F. Ins. Co. Same v. N. British etc. Ins. Co.....	<i>Libel</i>	63 Mich. 425.....	330
Brands v. De Witt.....	<i>Insurance</i>	80 Mo. 396.....	219
Bray v. Clapp.....			
Brickhouse v. Sutton.....	<i>Release</i>	44 N. J. Eq. 545.....	909
Brown v. Williams.....	<i>Husband and wife</i>	80 Mo. 277.....	197
Bunn v. Lindsay.....	<i>Dower</i>	99 N. C. 103.....	497
Burr v. Maulsby.....	<i>Mechanics' liens</i>	120 Pa. St. 24.....	689
Burt v. Timmons.....	<i>Homesteads</i>	95 Mo. 250.....	48
Campbell v. Boddy.....	<i>Mechanics' liens</i>	99 N. C. 263.....	517
Cannon v. Western Union Tel. Co.....	<i>Fraud. conveyances</i>	29 W. Va. 441.....	664
Carlin v. Ritter.....	<i>Fixtures</i>	44 N. J. Eq. 244.....	889
Carpenter v. Medford.....	<i>Telegraphs</i>	100 N. C. 300.....	590
Chapman v. City of Rochester.....	<i>Fixtures</i>	68 Md. 478.....	467
Clark v. Bradstreet.....	<i>Growing trees</i>	99 N. C. 495.....	535
	<i>Nuisance</i>	110 N. Y. 273.....	366
	<i>Bastardy</i>	80 Mo. 454.....	221

NAME.	SUBJECT.	REPORT.	PAGE.
Clark v. Snow	<i>Neg. instruments.</i>	60 Vt. 205.....	108
Clemmons v. Field.....	<i>Judgments.</i>	99 N. C. 400.....	529
Coleman v. Applegarth.....	<i>Contracts.</i>	68 Md. 21.....	417
Collyer v. Collyer.....	<i>Wills.</i>	110 N. Y. 481.....	405
Commonwealth v. Fitzpatrick.....	<i>Murder.</i>	121 Pa. St. 109....	757
Conway v. Lewis.....	<i>Factors.</i>	120 Pa. St. 215....	700
Cook v. Moore.....	<i>Judgments.</i>	100 N. C. 294.....	587
Coward v. Chastain.....	<i>Injunctions.</i>	99 N. C. 443.....	533
Danforth v. Robinson.....	<i>Insolvency.</i>	80 Me. 466.....	224
Daniels v. State.....	<i>Burglary.</i>	78 Ga. 98.....	238
Dawson, Matter of.....	<i>Attachment.</i>	110 N. Y. 114.....	346
Deaderick v. Oulds.....	<i>Replevin.</i>	86 Tenn. 14.....	812
Delaware etc. R. R. Co. v. Cadow.....	<i>Negligence.</i>	120 Pa. St. 556....	730
Dennis v. Jones.....	<i>Contracts.</i>	44 N. J. Eq. 513...	899
Dewey v. St. Albans Trust Co.	<i>Judgments.</i>	60 Vt. 1.....	84
De Witt v. Van Schoyk.....	<i>Injunctions.</i>	110 N. Y. 7.....	342
Dobyns v. Meyer.....	<i>Chattel mortgages.</i>	95 Mo. 132.....	32
Drew v. Edmunds.....	<i>Sales.</i>	60 Vt. 401.....	122
Dunbar v. Dunbar.....	<i>Gifts.</i>	80 Me. 152.....	166
Earnshaw v. Sun Mutual Aid Soc.	<i>Unincorp. societies.</i>	68 Md. 465.....	460
East Tennessee etc. R. R. Co. v. De Armond	<i>Master and servant.</i>	86 Tenn. 73.....	816
Edwards v. Bowden.....	<i>Deeds.</i>	99 N. C. 80.....	487
Edwards v. Peterson.....	<i>Assignments.</i>	80 Me. 367.....	207
Ellis v. American Academy of Music.....	<i>Nuisance.</i>	120 Pa. St. 608....	739
Fahey v. Crotty.....	<i>Trespass.</i>	63 Mich. 383.....	305
Farrior v. Houston.....	<i>Executions.</i>	100 N. C. 369.....	597
Fire Insurance Patrol v. Boyd.....	<i>Charities.</i>	120 Pa. St. 624....	745
First National Bank of Baltimore v. Gerke.....	<i>Suretyship.</i>	68 Md. 449.....	453
Foster v. Adams.....	<i>Sales.</i>	60 Vt. 392.....	120
Fowler v. Western Union Tel. Co.	<i>Telegraphs.</i>	80 Me. 381.....	211
Frazee, Matter of.....	<i>Munic. corporat'ns.</i>	63 Mich. 396.....	310
Gibbons v. Farwell.....	<i>Trover.</i>	63 Mich. 344.....	301
Given's Appeal.....	<i>Judgments.</i>	121 Pa. St. 260....	795
Green v. Rick.....	<i>Mortgages.</i>	121 Pa. St. 130....	760
Gregory v. Commonwealth.....	<i>Payments.</i>	121 Pa. St. 611....	804
Halliburton v. Carson.....	<i>Ex'rs and adm'rs.</i>	100 N. C. 99.....	565
Halliday v. Miller.....	<i>Parent and child.</i>	29 W. Va. 424....	653
Hazell v. Bank of Tipton.....	<i>Assignments for benefit of cred'rs.</i>	95 Mo. 60.....	22
Herrington v. Village of Lansingburgh.....	<i>Munic. corporat'ns.</i>	110 N. Y. 145.....	348
Hessell v. Johnson.....	<i>Suretyship.</i>	63 Mich. 623.....	334
Hickam ada. State.....	<i>Criminal law.</i>	95 Mo. 322.....	54
Higgins v. Lodge.....	<i>Sales.</i>	68 Md. 229.....	437
Hitchins v. Mayor etc. of Frostburg.....	<i>Munic. corporat'ns.</i>	68 Md. 100.....	422

CASES REPORTED.

11

NAME.	SUBJECT.	REPORT.	PAGE.
Hodges v. Heal.....	<i>Trespass.</i>	80 Me. 281.....	199
Holloway v. Jacoby.....	<i>Sales</i>	120 Pa. St. 583....	787
Horton ads. State.....	<i>Seduction</i>	100 N. C. 443.....	613
Houston v. Bryan.....	<i>Deeds</i>	78 Ga. 181.....	252
Hubbard and Wife v. Manwell...	<i>Waters</i>	60 Vt. 235.....	110
Hasy v. Gahlenbeck.....	<i>Negligence</i>	121 Pa. St. 238....	790
Jacobs v. Commonwealth.....	<i>Criminal law</i>	121 Pa. St. 586....	802
Johnson v. Merithew.....	{ <i>Writ of entry— death.</i> }	80 Me. 111.....	162
Kennedy, In re.....	<i>Attorneys at law</i> ...	120 Pa. St. 497....	724
Kinports v. Boynton.....	<i>Vendor and vendee</i> ...	120 Pa. St. 306....	706
Knott v. Taylor.....	<i>Judgments</i>	99 N. C. 511.....	547
Lancy v. Randlett.....	<i>Equity</i>	80 Me. 169.....	169
Landgraf ads. State.....	<i>Murder</i>	95 Mo. 97.....	26
Lincoln v. Quynn.....	<i>Sales</i>	68 Md. 299.....	446
Louisville etc. R. R. Co. v. Stacker.	<i>Master and servant.</i>	86 Tenn. 343.....	840
Love v. Francis.....	<i>Gifts</i>	63 Mich. 181.....	290
Love v. State.....	<i>Sales</i>	78 Ga. 60.....	234
Lyon v. Ballentine.....	<i>Chattel mortgages.</i>	63 Mich. 97.....	284
Lyons v. Murray.....	<i>Creditor's bills.</i> ...	95 Mo. 23.....	17
Mackay, Matter of.....	<i>Wills</i>	110 N. Y. 611.....	409
Malaney v. Taft.....	<i>Bailments</i>	60 Vt. 571.....	135
Marshall Foundry Co. v. Killian..	<i>Corporations</i>	99 N. C. 501.....	539
Mary Ann Lindsley, In the Mat- ter of the Lunacy of.....	{ <i>Insanity</i>	44 N. J. Eq. 564..	913
McClelland v. Norfolk S. R. Co.	<i>Bonds</i>	110 N. Y. 469.....	397
McGlinchey v. Fidelity and Casualty Co.....	{ <i>Insurance</i>	80 Me. 251.....	190
McNair v. Wilcox.....	<i>Trover—p'nership</i> ...	121 Pa. St. 437....	799
McNaught v. Anderson.....	<i>Husband and wife.</i>	78 Ga. 499.....	278
McNeal Pipe and Foundry Co. v. Howland.....	{ <i>Removal of causes.</i>	99 N. C. 202.....	513
Melick v. Pidcock.....	<i>Deeds</i>	44 N. J. Eq. 525..	901
Merchants' Dispatch Transporta- tion Co. v. Bloch Bros.....	{ <i>Common carriers</i> ..	86 Tenn. 392.....	847
Michael v. Foil.....	<i>Vendor and vendee</i> ...	100 N. C. 178.....	577
Miffin's Appeal.....	<i>Wills</i>	121 Pa. St. 205....	781
Moore v. Alden.....	<i>Wills</i>	80 Me. 301.....	203
Narrows Island Club ads. State..	<i>Waters</i>	100 N. C. 477.....	618
Nave v. Smith.....	<i>Co-tenancy</i>	95 Mo. 596.....	79
Neider ads. State.....	<i>Parent and child.</i>	29 W. Va. 751....	676
Newby v. Harrell.....	{ <i>Negligence— partnership.</i> }	99 N. C. 149.....	503
Niagara Fire Ins. Co. v. Miller...	<i>Insurance</i>	120 Pa. St. 504....	726
North v. Williams.....	<i>Trespass</i>	120 Pa. St. 109....	695
Nugent v. Boston etc. R. R. Co..	<i>Negligence</i>	80 Me. 62.....	151
Nurney v. Fireman's Fund Ins. Co.	<i>Insurance</i>	63 Mich. 633.....	338
Owens v. Kansas City etc. R'y Co.	<i>Common carriers.</i>	95 Mo. 169.....	39

NAME.	SUBJECT.	REPORT.	PAGE.
Palmer v. Village of St. Albans.....	<i>Negligence</i>	60 Vt. 427.....	125
Parkhurst v. Berdell.....	<i>Judgments</i>	110 N. Y. 386.....	334
Peaslee v. Fletcher's Estate.....	<i>Wills</i>	60 Vt. 188.....	103
Pegram v. Western Union Tel. Co.....	<i>Telegraphs</i>	100 N. C. 28.....	557
People v. King.....	<i>Criminal law</i>	110 N. Y. 418.....	339
People v. Lake.....	<i>Incest</i>	110 N. Y. 61.....	344
Pepper, Appeal of.....	<i>Powers</i>	120 Pa. St. 235.....	702
Philadelphia etc. R. R. Co. v. Davis.....	<i>Easements</i>	68 Md. 281.....	440
Phillips v. Swank.....	<i>Vendor and vendee</i>	120 Pa. St. 76.....	691
Pickens v. Knisely.....	<i>Married women</i>	29 W. Va. 1.....	622
Pitt v. Moore.....	<i>Spec. performance</i>	99 N. C. 85.....	489
Read v. Patterson.....	<i>Trusts</i>	44 N. J. Eq. 211.....	877
Ricks v. Broyles.....	<i>Receivers</i>	78 Ga. 610.....	280
Roberts v. Atherton.....	<i>Insolvency</i>	60 Vt. 563.....	133
Rommel v. Schambacher.....	<i>Inns</i>	120 Pa. St. 579.....	732
Rutter v. Small.....	<i>Co-tenancy</i>	68 Md. 133.....	434
Schmidt v. McGill.....	<i>Negligence</i>	120 Pa. St. 405.....	713
Schrimpf v. Tennessee Mfg. Co.....	<i>Master and servant</i>	86 Tenn. 219.....	832
Scranton City's Appeal.....	<i>Munic. corporat'ns</i>	121 Pa. St. 97.....	755
Selinas v. Vermont State Agricultural Society.....	<i>Negligence</i>	60 Vt. 249.....	114
Shadden v. McElwee.....	<i>Slander</i>	86 Tenn. 146.....	821
Shoro v. Shoro.....	<i>Marr'ge and divorce</i>	60 Vt. 268.....	118
Smith v. Du Bose.....	<i>Wills—contracts</i>	78 Ga. 413.....	260
Smith v. Niagara Fire Ins. Co.....	<i>Insurance</i>	60 Vt. 682.....	144
Springs v. Sohenok.....	<i>Land, and tenant</i>	99 N. C. 551.....	552
State v. Hickam.....	<i>Criminal law</i>	95 Mo. 322.....	54
State v. Horton.....	<i>Seduction</i>	100 N. C. 443.....	613
State v. Landgraf.....	<i>Murder</i>	95 Mo. 97.....	26
State v. Narrows Island Club.....	<i>Waters</i>	100 N. C. 477.....	618
State v. Thompson.....	<i>Evidence</i>	80 Me. 194.....	172
State v. Williams.....	<i>Larceny</i>	95 Mo. 247.....	46
State ex rel. Neider v. Reuff.....	<i>Parent and child</i>	29 W. Va. 751.....	576
St. Johnsbury etc. R. R. Co. v. Hunt.....	<i>Process</i>	60 Vt. 583.....	138
Stumore v. Shaw.....	<i>Evidence</i>	68 Md. 11.....	412
Sulsbacher Bros. v. Bank of Charleston.....	<i>Neg. instruments</i>	86 Tenn. 201.....	828
Sutherland v. Ingalls.....	<i>Trespass</i>	63 Mich. 620.....	332
Tarbell v. Royal Exchange Shipping Co.....	<i>Common carriers</i>	110 N. Y. 170.....	350
Taylor v. Seaboard etc. R. R. Co.....	<i>Common carriers</i>	99 N. C. 185.....	509
Thompson ads. State.....	<i>Evidence</i>	80 Me. 194.....	172
Tiffany v. Commonwealth.....	<i>Criminal law</i>	121 Pa. St. 165.....	775
Tillotson v. Prichard.....	<i>Covenants</i>	60 Vt. 94.....	95
Turner v. Cape Fear etc. R. R. Co.....	<i>Negligence</i>	99 N. C. 298.....	521
Troy v. Johnson.....	<i>Mortgages</i>	95 Mo. 431.....	62
Turrentine v. Wilmington etc. R. R. Co.....	<i>Warehouseman</i>	100 N. C. 375.....	602

CASES REPORTED.

13

NAME.	SUBJECT.	REPORT.	PAGE.
Wadsworth v. Western Union Telegraph Co.....	{ <i>Telegraphs</i>	86 Tenn. 695.....	864
Weed v. Keenan.....			
West Branch Boom Co. v. Lam- ber and Land Co.....	{ <i>Adverse possession</i>	60 Vt. 74.....	93
West Nashville Planing Mill Co. v. Nashville Savings Bank...			
West Nashville Planing Mill Co. v. Nashville Savings Bank...	{ <i>Corporations</i>	121 Pa. St. 143....	766
West Nashville Planing Mill Co. v. Nashville Savings Bank...			
West Nashville Planing Mill Co. v. Nashville Savings Bank...	{ <i>Corporations</i>	86 Tenn. 252.....	835
West Nashville Planing Mill Co. v. Nashville Savings Bank...			
Western Lunatic Asylum v. Miller.	<i>Stat. of limitations</i> ..	29 W. Va. 325...	644
White v. Foote Lumber etc. Co...	<i>Married women</i> ..	29 W. Va. 385...	650
Whittemore v. Russell	<i>Wills</i>	80 Me. 297	200
Williams v. Hay.....	<i>Easements—mines</i> ..	120 Pa. St. 485....	719
Williams v. Huntington.....	<i>Neg. instruments</i> ..	68 Md. 590	477
Williams v. Lewis.....	<i>Wills</i>	100 N. C. 142.....	574
Williams ada. State.....	<i>Larceny</i>	95 Mo. 247	46
Winchester v. Everett.....	<i>Falses imprisonment</i> ..	80 Me. 535	228
Woodward v. Shamppe.....	<i>Master and servant</i> ..	120 Pa. St. 458....	716
Wright v. Bank of Metropolis....	<i>Trover</i>	110 N. Y. 237	356
Wright v. City Council of Augusta.	<i>Munic. corporat'ns</i> ..	78 Ga. 241.....	256



AMERICAN STATE REPORTS.
VOL VI



CASES
IN THE
SUPREME COURT
OF
MISSOURI.

LYONS v. MURRAY.

[95 MISSOURI, 22.]

CREDITOR'S BILL. — IF CREDITORS HAVE OBTAINED GENERAL JUDGMENTS against their debtor's estate, but cannot take out execution thereon because of his death, and the estate being insolvent, no further proceedings at law are required to lay the foundation for equitable relief in the shape of a creditor's bill as against a fraudulent grantee.

PARTNER WHO VOLUNTARILY PAYS FIRM DEBTS with his individual means does not thereby become a firm creditor for the amount paid, so as to be subrogated to the rights of the creditors whose debts he paid, in a state where partnership debts are joint and several. He only has the right to bring the payments into his accounts, and after the other firm debts are paid, the amount he paid goes to his credit in a settlement between the partners.

CREDITOR'S BILL IS SUFFICIENT, as against a general demurrer stating no specific objections, when the bill, which is brought to subject certain funds to a judgment at law, alleges that one partner, on the death of the other, administered on the partnership estate, and paid a firm debt out of his individual estate, and on final distribution of the firm's assets, procured an order to pay forty-two per cent of such firm debt out of the partnership property, and paid such amount with intent to defraud his creditors, and thus take credit for a fictitious payment; and the bill need not allege, in terms, that the creditor received the last payment to aid in defrauding creditors, nor that he had notice of such intended fraud, for the reason that it was without consideration, and void as to them.

PARTNERSHIP — VOLUNTARY PAYMENT OF FIRM DEBT BY ADMINISTERING PARTNER, FRAUDULENT AS TO INDIVIDUAL CREDITORS. — Where one partner, on the death of the other, administers on the partnership estate, and pays out of his individual property a firm debt due a creditor, and then, on final distribution of the estate, obtains an order of court, and pays forty-two per cent of the same debt out of the firm assets, such payment, being for no consideration, is void as to the administrator's creditors, he being largely indebted at the time, even though the creditor paid is innocent of any fraudulent intent.

PARTNERSHIP. — **INDIVIDUAL CREDITORS OF PARTNER** who is acting as administrator of the partnership estate on the death of the other partner are not parties or privies to the order of distribution of firm assets, so as to be bound thereby, when the administering partner is alive at the time and his individual property is not in liquidation.

W. H. Briggs, for the plaintiff in error.

Smith, Silver, and Brown, and W. P. Harrison, for the defendant in error.

BLACK, J. Plaintiffs sued out this writ of error to review the judgment of the circuit court in sustaining a demurrer to the amended petition. Aaron McPike, one of the plaintiffs, recovered a judgment against Edward C. Murray, Archibald M., William M., and Walter J. Van Horn, partners, doing business under the firm name of Van Horn, Murray, and Company, for some fourteen hundred dollars, in the year 1870. The other plaintiffs, Sarah C. Lyons and the Bank of Pike County, obtained judgments against Murray, the former for \$142, and the latter for \$4,740. Thereafter, and in 1870, William M. Van Horn died, and Murray gave bond as surviving partner and administered upon the partnership effects. In 1882 Murray died, and the defendant became the administratrix of his estate. The plaintiffs then had their judgments allowed by the probate court and classed as demands against the Murray estate.

The petition makes these further allegations: That, in 1870, William C. Luce had demands allowed by the probate court against the firm assets, amounting to \$12,566; that prior to the 14th of November, 1879, Murray sold and delivered to Luce all of his individual property, real and personal, in payment and in satisfaction of these firm debts held by Luce; that on the last-mentioned date, Murray filed a settlement in the probate court, showing a balance of firm money in his hands of \$10,875; that he then procured an order of the probate court, directing him to pay forty-two per cent of the demands allowed in favor of Luce out of the firm moneys; that Murray, with intent to hinder, delay, and defraud his creditors, and to cover up his property, paid to Luce out of the firm moneys on these allowed demands the sum of \$8,972; that the previous payment of the same debts by Murray out of his individual property rendered him insolvent; that the other members of the firm of Van Horn, Murray, and Company are insolvent; and that in equity the \$8,972 belonged to Murray, and should in the hands of Luce be subjected to the payment

of the debts held by the plaintiffs against the Murray estate. Luce died pending this suit, and defendant qualified as his executrix. The petition, it will be seen, is in the nature of a creditor's bill, seeking to reach money in the hands of Luce.

1. The point made by the defendant that this suit cannot be maintained, because the plaintiffs have not exhausted their remedy at law by execution, is not well taken. They have had their general judgments allowed by the probate court against the Murray estate. Murray, the debtor, here pursued, being dead, no execution can be issued on those general judgments, as against his estate, and that estate being insolvent, no further proceedings at law are required to lay a foundation for equitable relief against a fraudulent grantee: *Merry v. Fremon*, 44 Mo. 518; *Pendleton v. Perkins*, 49 Id. 565.

2. The plaintiffs insist that, where one partner voluntarily pays debts of the firm with his individual means, he thereby becomes a creditor of the firm for the amount thus paid, and is entitled to be subrogated to all of the rights of the creditors whose debts he paid, and hence, in equity, the \$8,972 was the money of Murray. But under our law a partnership debt is joint and several. Murray was bound, individually, for the payment of these partnership debts held by Luce, and his individual property could have been taken on executions therefor, and this too, though the partnership was dissolved and in liquidation by reason of the death of Van Horn. When Murray paid these partnership debts, he did not stand in the shoes of the creditors. He could not, with these debts paid by him, come in competition with the other firm creditors. He had the right, however, to bring these payments into his accounts, and after the payment of the other partnership debts, the amounts thus paid by him would go to his credit in a settlement as between the partners. Neither he nor his individual creditors could demand more than his proportionate share of the residue on a balance and settlement of the accounts as between the partners: *Collyer on Partnership*, 6th ed., sec. 109, and notes by Wood; 20 Pa. St. 45; 82 Id. 152. But for the amount due him on final settlement, augmented as it would be by the payments made to Luce, he had what is now called a lien on the firm assets: *Collyer on Partnership*, sec. 109; 2 *Lindley on Partnership*, 680. He had a right to hold the money in his hands as surviving partner, and pay what was due to himself on such balance of accounts. To the ex-

tent, therefore, that he fraudulently disposed of his interest in this surplus, to that extent he defrauded his individual creditors.

But it is said the petition does not show that Murray had any interest in this fund, for it may be, for aught that is stated, that he owed it all to his partners, and there would be nothing due to him on final settlement of the accounts as between the partners. It is shown by the petition that the firm debts, aside from those held by Luce, amounted to only \$2,134; that they have been paid, except the \$1,400 due to plaintiff McPike. Murray was entitled to a credit of \$12,566, as between the partners, which he did not claim, but took a credit for \$8,972 for a fictitious payment, so as to absorb the funds in his hands. These facts, with the allegation that this last amount in equity belonged to Murray, sufficiently show an individual interest in the fund as against a general demurrer, pointing out no specific objections to the petition.

3. But aside from any lien to be worked out through the partnership, the petition states a cause of action. It must be taken that Murray paid the debts to Luce after they had been allowed by the probate court against the firm assets. This he did with his individual property, real and personal. He then procured the order to pay to Luce on the same debts, from the firm assets, \$8,972. This it is alleged he did to defraud the plaintiffs. It may be that this second payment was a fraud on the other partners, for it is possible that Murray should have paid this money to them besides having paid the firm debt held by Luce, but the record shows no such case. Besides, the partners are making no complaint; and it is a most remarkable position taken by the defendant to say that the Luce estate is not liable to the plaintiffs because some other persons may have been defrauded. It is no answer to the fraud charged in the petition to say that the partners of Murray were also defrauded.

4. It is true, the petition does not in terms state that Luce received the last payment to aid Murray in defrauding his creditors, nor is it alleged that Luce had any notice of the intended fraud. The second payment, however, was without any consideration whatever, and Luce occupies no other position than that of a voluntary donee. Murray, being largely indebted, was bound to pay his debts before he could, as against his creditors, give away his property. As to existing creditors, the donee in such cases occupies no better position

than the donor; the transfer of property, under such circumstances, is as to both fraudulent in law.

5. Finally, the executrix of the Luce will intrenches herself behind the order of distribution made in the partnership estate, and insists that this order is in effect a judgment, and is conclusive evidence of the validity of the payment of the forty-two per cent to Luce. For the purposes of this case, let it be conceded that the order is to be regarded as a judgment, and that it is conclusive as between the parties thereto and their privies, and cannot by them be attacked for fraud, except by appeal or a direct proceeding to vacate the order for fraud. But do the plaintiffs stand in any such relation to that order? Bigelow says the doctrine of the English cases is, that no one who was a party to the former proceedings, or who might have intervened or appealed from them, can, in a collateral proceeding, allege that the judgment was obtained by fraud; while the contrary is true as to persons who could not have thus intervened or appealed: Bigelow on Estoppel, 148. Now, when this order was procured and the money paid pursuant thereto, Murray was alive; his individual estate was not in liquidation, and his individual creditors had nothing to do with the partnership settlements and proceedings in the probate court. Even as to the deceased member of the firm, the allowance of partnership demands, against the partnership estate, would not bind the individual estate: R. S., sec. 65. Murray's individual creditors had no right to appear in the partnership proceedings and take appeals or object to the judgments of the court. In no sense can it be said the individual creditors were parties or privies to the order of distribution. If A should fraudulently confess a judgment in favor of B, and that judgment should come into collision with other creditors of A, they may, in a collateral proceeding, show that the judgment was collusive and fraudulent as to the creditors of A, and as to them void. The judgment will, as to the parties thereto, stand as valid; but as to the other creditors it will be void. It is, therefore, not essential to the plaintiff's right to follow the money fraudulently paid to Luce that the order of distribution should be set aside.

It may be said that one of the plaintiffs is a partnership creditor, but as no question is made of a defect of parties, we will not stop to consider what, if any, effect that has as to him.

The judgment is reversed and the cause remanded.

CREDITOR'S BILLS GENERALLY: See the extended note to *Massey v. Gorton*, 90 Am. Dec. 288-302.

POWERS AND DUTIES OF SURVIVING PARTNER: See extended note to *Shields v. Fuller*, 65 Am. Dec. 295-303; *Williams v. Whedon*, 109 N. Y. 333; 4 Am. St. Rep. 460, and note.

PAYMENT BY PARTNERS OF FIRM DEBT FURNISHES NO CLAIM against the copartners until settlement of partnership accounts: *Bishop v. Bishop*, 54 Conn. 232.

CREDITOR'S BILL — WHAT NECESSARY TO MAINTAIN when the debtor is dead or insolvent: *Kempton v. Hollowell*, 24 Ga. 52; 71 Am. Dec. 112, and note 117; *Brown v. Long*, 1 Ired. Eq. 190; 36 Am. Dec. 43; *Unknown Heirs v. Kimball*, 4 Ind. 546; 58 Am. Dec. 638.

COPARTNER, LIEN OF, ON PARTNERSHIP PROPERTY when he has paid more than his share of partnership debts: *Crooker v. Crooker*, 52 Ma. 267; 83 Am. Dec. 509, and note 513.

HAZELL v. BANK OF TIPTON.

[95 MISSOURI, 60.]

ASSIGNMENT FOR BENEFIT OF CREDITORS — RIGHT TO OPEN AND CLOSE. —

Where plaintiff in attachment answers an interplea, and admits an assignment, but alleges that it is fraudulent and void, the burden is on him to prove it, and consequently he has the right to open and close, both in the introduction of evidence and in the argument.

DECLARATIONS AS EVIDENCE. — WHERE VALIDITY OF ASSIGNMENT for the benefit of creditors is in issue, an attaching creditor may show a conversation had before the assignment, in which the assignor gave as a reason for assigning that he could then get a better settlement with his creditors. He may also prove conversations had with the assignor, in the presence of the assignee, shortly after the assignment, at a meeting of creditors, to effect a compromise.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS — ESTOPPEL. — Where an attaching creditor is seeking to prove the invalidity of an assignment, and the assignor, prior to the assignment, has represented himself to be worth a large sum in excess of his liabilities, such creditor is not estopped by representing to other creditors, prior to the assignment, that in his opinion the assignor was solvent, and worth a large sum in excess of his liabilities and exemptions.

PARTY CANNOT COMPLAIN OF INSTRUCTION AS ERRONEOUS, when the instructions given at his request contain the same vice.

ASSIGNMENT FOR BENEFIT OF CREDITORS is not fraudulent when the embarrassed creditor making it intends only such delay and hindrance to his creditors as would follow as an incident to the assignment.

ASSIGNMENT FOR BENEFIT OF CREDITORS. — DEMURRER TO EVIDENCE is properly denied when there is some evidence, though slight, justifying the submission of the good faith of the parties to the assignment.

Cosgrove and Johnston, Moore and Williams, and Smith, Silver, and Brown, for the plaintiff in error.

Draffen and Williams, G. P. B. Jackson, L. F. Wood, and W. P. Johnson and Son, for the defendant in error.

NORTON, C. J. The Bank of Tipton, defendant in error, instituted an attachment suit in the Moniteau County circuit court against Cochel and Bechtel, who were merchants engaged in the sale of hardware in the town of Tipton. The writ of attachment was levied upon a stock of goods as belonging to them. On the same day said writ was levied, viz., the 3d of January, 1885, and a short time before it was issued and levied, an assignment, executed by said Cochel and Bechtel, conveying all their property to one Barrick, as assignee for the benefit of all their creditors, was filed for record. In March following, the said Barrick resigned his trust, and James E. Hazell was duly appointed to execute the trust. At the return term of the writ of attachment said Hazell appeared, and by leave of court filed an interplea claiming in virtue of said assignment the property which had been levied upon.

The plaintiff bank in the attachment suit filed an answer to the interplea denying the right of the assignee and alleging in substance that the assignment was made with the intent to hinder, delay, and defraud the creditors of said Cochel and Bechtel, and that the assignee, Barrick, was a party to said fraud, and acting in the interest of said firm and to aid them in their fraudulent purpose; that said assignment was made to him because of his insolvency and willingness to serve them; that their intention was to put the property in the hands of Barrick and secure it from execution and attachment, and use the assignment as a means of coercing their creditors into a compromise, and that said assignment passed no title to the property, either to Barrick or to interpleader Hazell, as his successor. The replication to this answer denied all frauds, and set up that said bank had full knowledge of the financial condition of said firm and of their intention to make said assignment, and that by reason of its representations made to other creditors of the solvency of said firm and their good faith in making said assignment, the bank was estopped from contesting its validity.

The issue of fraud thus made up was tried before a jury, and a verdict returned in favor of the plaintiff bank in the attachment suit, upon which judgment was rendered, and from which Hazell, the interpleader, has appealed to this court; and among other grounds of error alleges that the court erred in holding that, under the issues as made by the pleadings, the plaintiff bank in the attachment suit had the right to open

and close the case, both in the introduction of evidence and in the argument of the cause to the jury. We see no just ground of complaint to this ruling, since the answer was in the nature of confession and avoidance. It admits the assignment, but alleged it to be fraudulent and void, the burden of proving which was on the shoulders of the party averring it: *Albert v. Besel*, 88 Mo. 150.

Nor do we see any just ground of complaint to the action of the court in allowing witnesses Reavis and McClay to detail a conversation had with Cochel and Bechtel a short time before the assignment was made, in which Cochel gave as a reason for wanting to make an assignment that he could then get a better compromise with his creditors, and that he wanted to make it to get a better settlement with his creditors; nor in allowing a conversation to be detailed, had with Cochel and Bechtel in the presence of Barrick, the assignee, the day after the assignment was made, at a meeting of the creditors, held for the purpose of effecting a compromise. The presence of Barrick, the assignee, at this conversation made what was then said admissible.

It is also objected that the court erred in excluding the deposition of one Elliott, to the effect that, on January 1 and 2, 1885, as the representative of certain creditors, he asked the cashier of the Bank of Tipton for his opinion as to the financial condition of Cochel and Bechtel, and was told that they, in his judgment, were solvent; that they owed the bank two thousand dollars, for which the bank held no security, but they were not uneasy; that, in his judgment, the firm was worth four or five thousand dollars clear of the world, or above their exemptions. In view of the fact in evidence that Cochel and Bechtel had made a showing or representation to the officers of the bank to the effect that they had several thousand dollars of assets over and above their liabilities, we are unable to perceive the relevancy of this evidence offered.

It is also insisted, on the authority of the cases of *Holmes v. Braidwood*, 82 Mo. 610, *Shelley v. Boothe*, 73 Id. 77, 39 Am. Rep. 481, and *Albert v. Besel*, 88 Mo. 150, that the court erred in giving the following instruction:—

“1. If the jury believe, from the evidence, that the assignment of Cochel and Bechtel to Barrick was made by Cochel and Bechtel for the purpose and with the intent of hindering, delaying, or defrauding any of their creditors, and that said Barrick had notice thereof, then said assignment was

fraudulent, and the finding of the jury must be for the defendant."

Conceding this contention to be well founded, the interpleader, under the ruling made in the case of *Holmes v. Braidwood*, *supra*, is not in a position to take advantage of it, since the same vice of which he complains in the above instruction is to be found in the eighth and ninth instructions given by the court at his own instance.

The action of the court in refusing instructions asked by the interpleader, numbered six, ten, eleven, twelve, thirteen, sixteen, and twenty, is also complained of. Among those refused is the following:—

"Although the jury may believe that the making of the assignment had the effect of hindering or delaying, and was made with the intent and purpose to hinder or delay, the creditors of said Cochel and Bechtel, or any one or more of them, yet, if the only hindrance and delay intended was such as would be incidental to and a result of carrying out the said deed of assignment, it cannot be fraudulent because of the effect and intent above stated."

In refusing this instruction, we are of the opinion that the court committed error: See, in addition to the cases last above cited, the following: *Potter v. McDowell*, 31 Mo. 75; *Singer v. Goldenburg*, 17 Mo. App. 550. The right of a party in embarrassed circumstances to make an assignment of all of his property for the payment of his debts and the benefit of all his creditors cannot be questioned, and if, in the exercise of this right, he only intends such delay and hindrance to his creditors as would follow as an incident to the assignment, such intent cannot invalidate the assignment as being fraudulent.

The sixth and twentieth refused instructions were in the nature of a demurrer to the evidence, and were properly refused, as there was some evidence, though slight, justifying the submission of the good faith of the parties to the assignment. The other refused instructions were substantially embraced in others that were given, and were for that reason properly refused.

As the error noted is sufficient to reverse the judgment, it is unnecessary to notice the objections made to the action of the court in refusing to submit special issues to the jury, inasmuch as the present state of the law on that subject takes that question out of the case.

Judgment reversed and cause remanded.

PARTY HOLDING AFFIRMATIVE OF ISSUE HAS THE RIGHT TO OPEN AND CLOSE AT THE TRIAL: *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83; but this rule is purely one of practice, and will not be reviewed in absence of abuse of discretion: *Id.*; *Preston v. Walker*, 26 Iowa, 206; 96 Am. Dec. 140, and note.

BARE INTENTION TO HINDER AND DELAY CREDITORS will not void a general assignment for the benefit of creditors, for such is its usual and necessary effect. It will be valid if its purpose is to pay honest debts: *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806, and note 819; *Nicholson v. Leavitt*, 6 N. Y. 510; 57 Am. Dec. 499.

DECLARATIONS MADE SUBSEQUENT TO ASSIGNMENT are not admissible to defeat the title of the grantee: *Burt v. McKinstry*, 4 Minn. 204; 77 Am. Dec. 507.

STATE v. LANDGRAF.

[95 MISSOURI, 97.]

CRIMINAL LAW—MURDER—UNSKILLFUL MEDICAL TREATMENT.—When wound inflicted is the cause of death, the accused is guilty of murder, though unskillful medical treatment may have aggravated the wound, and the deceased might have recovered if greater care and skill had been employed in treating him.

MURDER.—PREMEDITATEDLY IS PROPERLY DEFINED to mean, "thought of beforehand any time, however short."

MURDER.—DELIBERATELY IS PROPERLY DEFINED to mean "done in a cool state of the blood, and not done in a heat of passion engendered by a lawful or just provocation," in the absence of such lawful or just provocation.

MURDER.—JURY IS PROPERLY INSTRUCTED that, in order to convict of murder in the first degree, they must believe and find from the evidence that defendant not only shot deceased, but shot intending to kill; and in the absence of qualifying facts and circumstances, a person is presumed to have intended the natural, ordinary, and probable result of his acts. If it is found and believed from the evidence that defendant intentionally shot deceased in a vital part with a deadly weapon, from which death ensued, they must find that his intent was to kill, unless the evidence shows the contrary.

Simon S. Bass, for the appellant.

B. G. Boone, attorney-general, *A. C. Glover*, circuit attorney, and *C. O. Bishop*, for the state.

NORTON, C. J. Defendant was indicted in the St. Louis criminal court at its May term, 1885, for murder in the first degree, for killing one Annie Tisch, in the city of St. Louis, in March, 1885. After repeated continuances, he was put upon his trial at the March term, 1887, of said court, and was convicted of murder in the first degree. The case is before us on defendant's appeal, and it is insisted that the court

erred in giving instructions; and in order to a proper disposition of the objections relied upon, reference to the evidence is necessary.

A voluntary statement made by defendant after his arrest was put in evidence, and is as follows: "I got acquainted with that girl in Belleville about nine months ago, and we worked together there, and I got closely and intimately acquainted with her [hinting at illicit intercourses]. I promised to marry her so soon as I could provide a home for her in this city. I found employment in a machine-shop, and brought her over and put her in a boarding-house at Christy Avenue. In a few days I learned that she had intercourse with others in that boarding-house; I upbraided her for it, and asked her how it came that she looked so pale and sickly now; she excused herself as being sick, did n't sleep well; and I was satisfied that she was not true to me; and she even played dirty tricks on me, so I resolved to kill her rather than to carry on the way she did; I had set the 10th inst. as the day of our marriage, and made this evening an appointment with her; we would meet at my brother's"; and there he said he got in a dispute with her and shot her. This statement was made the night of the shooting, and soon after he was arrested.

Joseph Landgraf, a brother of defendant, testified that during the day of the night on which deceased was shot, defendant came to where he was at work, and during the conversation said: "I have made the motion before already to kill the girl; I am going to kill her to-night"; having requested his brother to let him bring deceased to his house, and being refused: "If you don't let me take her to your house I will take her to an assignation house, and I will kill her there."

The following statement, made by deceased, in the presence and hearing of defendant, the day after she was shot, was put in evidence: "Annie Tisch is my name; I am twenty-one years of age; this man before me I identify as Henry Landgraf; he is my lover; he is the man who shot me last night, whether with a revolver or anything else I don't know; I staid at Mrs. Duffy's, 908 Charles Street; a gentleman who stays there gave me a scrap-book, and Henry told me the negro had told him that two gentlemen stopping in the same house were too intimate with me, and Landgraf wanted to shoot me; this was on Tuesday night, March 3, 1885; yesterday he came again, and wanted me to leave the house and move down town; I went with him about eight o'clock, P. M.; took the

cars, and got off at Arsenal Street, and walked to the house on Lemp Avenue; I did not enter the house where his sister lives; Landgraf said nothing to me, and shot me; that is all I know."

After deceased was shot she was removed to the hospital, where it was ascertained that the bullet had entered the skull just above the eye, but in consequence of the soreness of the wound, excitement, and resistance of the deceased to the surgeon's efforts to locate the bullet, its location could not be determined. Afterwards, on the 12th of March, she was placed under the influence of an anæsthetic, and an operation was performed, and an effort made to locate the bullet by probing. After that deceased began to sink, and died on the 15th of March, ten days after she was shot. A *post-mortem* examination was held, which resulted in showing that the bullet had lodged between the skull and brain; that under it a clot of blood and water had formed, which produced compression of the brain, from which she died. There was some evidence tending to show that the wound was not necessarily mortal, and that death might have resulted from the operation performed in probing for the bullet.

Among others, the defendant assigns for error the action of the court in giving the following instruction: "If you believe and find from the evidence that defendant feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, shot Annie Tisch, and inflicted on her a dangerous wound on some vital part, as charged in the indictment, and that such shooting and wounding caused the death of said Annie Tisch, you should find the defendant guilty of murder in the first degree; notwithstanding you may also believe and find that unskilled medical treatment aggravated such wound, and that deceased might have recovered if greater care and skill had been employed in treating her."

It is argued that this instruction denies to defendant the benefit of the defense, that the death of deceased was produced or occasioned by other causes than the wound. We are unable to perceive wherein the instruction does this. On the contrary, it requires the jury to find, before they can convict defendant, that the wound was a dangerous one, inflicted on some vital part of the body, and that it caused the death of deceased.

The direction of the instruction, that if they so found, it mattered not that they might also believe and find that un-

skilled medical treatment aggravated such wound, and that deceased might have recovered if greater care and skill had been employed in treating her, finds abundant support in the authorities. In 3 Greenleaf's Evidence, section 139, it is said: "If death ensues from a wound given in malice, but not in its nature mortal, but which being neglected or mismanaged the party died, this will not excuse the prisoner who gave it; but he will be guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound or his own misconduct, and not the wound itself, was the sole cause of his death, for if the wound had not been given the party would not have died." So in 2 Bishop's Criminal Law, it is said in section 638 that the doctrine is established that "if the blow caused the death it is sufficient, though the individual might have recovered had he used proper care himself, or submitted to a surgical operation to which he refused submission, or had the surgeon treated him differently"; and in section 639 it is said: "In law, if the person dies by the action of the wound, and by the medical or surgical action jointly, the wound must clearly be regarded sufficiently a cause of the death; and the wound need not even be a concurrent cause, much less need it be the next proximate, for if it is the cause of the cause no more is required."

In the well-considered case of *Commonwealth v. Hackett*, 2 Allen, 141, after a review of the authorities bearing upon the question, it is said: "The well-established rule of the common law would seem to be that if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of the offense of murder or manslaughter, and that the person who inflicted it is responsible, though it appear that deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskillful or improper treatment aggravated the wound or contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. . . . The principle on which this rule is founded is one of universal application, and lies at the foundation of all our criminal jurisprudence. It is that every person is to be held to contemplate and be responsible for the natural consequences of his own acts. If a person inflicts a wound with a deadly weapon in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not

alter its nature or diminish its criminality to prove that other causes co-operated in producing the fatal result. Indeed, it may be said that neglect of the wound or its unskillful and improper treatment, which were of themselves consequences of the criminal act which might follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible. But however this may be, it is certain that the rule of law as stated in the authorities cited has its foundation in a wise and sound policy. A different doctrine would tend to give immunity to crime, and to take away from human life an essential and salutary safeguard. Amid the conflicting theories of medical men, and the uncertainties attendant on the treatment of bodily ailments and injuries, it would be easy in many cases of homicide to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which persons guilty of the highest crime might escape conviction and punishment."

The court instructed the jury that premeditatedly meant "thought of beforehand any time, however short." This definition is claimed to be erroneous, as the word has heretofore been defined to mean "thought of beforehand any length of time, however short." The omission of the word "length" from the instruction did not change the meaning of the word as heretofore usually defined, and the instruction as given was as favorable to defendant with the omitted word left out as if it had been inserted, and was in no way calculated to mislead the jury or prejudice the defendant.

The court defined "deliberately" to mean, "done in a cool state of the blood, and not done in a heat of passion engendered by a lawful or just provocation, and the court instructs you that in this case there is no lawful provocation." The record does not disclose any evidence either of a lawful or just provocation. It shows that the design to kill deceased was deliberately formed and meditated upon, and that the deceased was shot in pursuance of and in the execution of this design, and the omission of the court to tell the jury that there was no just cause of provocation, if erroneous, could work no prejudice to defendant.

The following instruction is also objected to, viz.: "In order to convict the defendant of murder in the first degree, you must believe and find from the evidence that defendant not only shot deceased, Annie Tisch, intentionally, but that he

shot her intending to kill her. In this connection, however, you are instructed that, in the absence of qualifying facts and circumstances, a person is presumed to have intended the natural, ordinary, and probable result of his acts. Wherefore, if you believe from the evidence that defendant intentionally shot Annie Tisch in a vital part with a deadly weapon, to wit, a loaded pistol, from which death ensued, you will find that he intended to kill, unless the facts and circumstances given in evidence show to the contrary."

No such inconsistency as is alleged to exist between this and the other instructions given is perceived, and that it contains a correct declaration of law has been held in the case of *State v. Gee*, 85 Mo. 647.

The cause was fairly and impartially tried, and the evidence fully sustains the verdict of the jury, and we find nothing in the record calling for an interference with the judgment, and it is hereby affirmed.

ONE WHO INFLICTS MORTAL WOUND IS RESPONSIBLE FOR CONSEQUENCES, although a surgical operation, believed to be necessary by competent surgeons, and properly performed, was ineffectual in giving relief, and the immediate cause of death: *Commonwealth v. McPike*, 3 Cush. 181; 50 Am. Dec. 727; *McAllister v. State*, 17 Ala. 434; 52 Am. Dec. 180. In *State v. Bantley*, 44 Conn. 537, 28 Am. Rep. 486, it is said that one who inflicts a wound is guilty of murder or manslaughter, according to the circumstances, although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskillful treatment contributed to his death. A more accurate rule is stated in *State v. Morphy*, 33 Iowa, 270, 11 Am. Rep. 122, and note, and *Crum v. State*, 64 Miss. 1, 60 Am. Rep. 44, and note, to the effect that mismanagement or ill treatment of the wound will not itself excuse the person who inflicted it; but that, in order to be an excuse, it must appear that maltreatment or neglect of the wound or misconduct of the patient, and not the wound itself, was the sole cause of death.

STATUTORY DEGREES OF MURDER: See the note to *Whiteford v. Commonwealth*, 18 Am. Dec. 774-787, showing what constitutes murder in the first degree; and see also *Keenan v. Commonwealth*, 44 Pa. St. 55; 84 Am. Dec. 414; *Schaffer v. State*, 22 Neb. 557; 4 Am. St. Rep. 274; and *Lang v. State*, 84 Ala. 1; 5 Am. St. Rep. 324.

DELIBERATION AND PREMEDITATION AS ELEMENTS OF MURDER are defined in the note to *Whiteford v. Commonwealth*, 18 Am. Dec. 778 et seq., and *Keenan v. Commonwealth*, 44 Pa. St. 55, 84 Am. Dec. 414. In *Lang v. State*, 84 Ala. 1, 5 Am. St. Rep. 324, it is said that an instruction to the effect that the crime must have been the result of a "formed design," imports all that is included in the words "deliberation and premeditation." In *Carter v. State*, 22 Fla. 553, the court say that the law does not prescribe what length of time should elapse between the formation of the design and its execution to constitute premeditation, but that it is sufficient if there was a fully formed purpose, with enough time for thought to enable the defendant to

become fully conscious of his design. In *People v. Williams*, 73 Cal. 531, an instruction that if defendant, under the circumstances detailed by the witnesses, "without further cause or provocation," killed the deceased, he was guilty of murder in the first degree, was erroneous in omitting the elements of premeditation and deliberation.

DOBYNS v. MEYER.

[96 MISSOURI, 152.]

CHATTEL MORTGAGE—DEED OF TRUST.—Trustee in a deed of trust, who takes possession of the property for the purposes specified in the deed, before the levy of an attachment, may hold it for such purposes, notwithstanding there was an agreement between the *census que trust* and debtor at the time of the execution of the deed that the latter might sell the property in the usual course of business for his own benefit.

Kehr and Tittmann, for the appellants.

Joseph S. Dobyns, per se.

BLACK, J. This is a suit for damages for carrying away doors and other manufactured building material. The judgment, which was for the plaintiff, was affirmed by the St. Louis court of appeals; but the case was then certified to this court, because one of the judges deemed the opinion contrary to a previous decision of this court. The facts are these: On the 20th of September, 1883, the Falter Manufacturing Company made to plaintiff, as trustee, a deed of trust upon certain real and personal property, including a stock of planing-mill material, to secure a large indebtedness to the Fifth National Bank. On the 9th of the following December, the manufacturing company made an assignment of all of its property for the benefit of all its creditors. The property in question was then turned over to the assignee. The assignee then gave the trustee in the deed of trust possession of all the property therein described, real and personal, including the property in question. After this, the defendants, creditors of the manufacturing company, levied a writ of attachment upon the property now in dispute, sold the same, and applied the proceeds to the payment of their debt. The deed of trust was duly recorded before the assignment.

There was evidence tending to show that at the date of the deed of trust there was an understanding between the bank and the manufacturing company that the latter might sell the stock in trade in the usual course of business for its own ben-

esit. But notwithstanding this agreement, the court instructed, that if the plaintiff, prior to the levy of the attachment, took possession of the property under the deed of trust and the agreement of the assignee, then the finding should be for the plaintiff; and in this it is claimed the court erred. It is not claimed that the agreement between the assignee and the trustee could or did amount to a new pledge. Indeed, it seems to be conceded that the trustee took possession by virtue of the deed of trust, and not otherwise. The agreement between the bank and the manufacturing company, that the latter might sell the stock in trade in the usual course of business, rendered the deed of trust fraudulent in law, as to creditors of the manufacturing company, as to the stock in trade; not, however, because there was any actual fraudulent intent, but because the conveyance was one to the use of the grantor: R. S. 1879, sec. 2496.

The sole question, then, is, whether the fact that the trustee took possession of the property in good faith, for the purposes specified in the deed of trust, with the consent of the assignee, made the deed of trust valid, as against creditors attaching after possession by the trustee. Cases are cited to show that possession by a mortgagee does not purge the mortgage of its fraudulent character; and among them our attention is called to *Armstrong v. Tuttle*, 34 Mo. 432. In that case the mortgage was fraudulent on its face because of a stipulation allowing the mortgagor to sell, etc. Some of the expressions of the court favor the contention that possession by the mortgagee would not make the mortgage valid. But the subsequent case of *Greeley v. Reading*, 74 Id. 309, is not unlike the present one. Reading had executed a mortgage to McCune upon a stock of groceries. The mortgage contained a stipulation rendering it void as to creditors, because it was held the stipulation made the mortgage one for the use of the grantor. Before the levy of the attachment, McCune, under an agreement with Reading, took possession of the stock in good faith, and because he did this, it was held that it was wholly immaterial that the mortgage was improperly recorded, or that it contained the stipulation that rendered it void, except as between the parties thereto. There, as in this case, the possession was taken by virtue of the mortgage. The case cites, with approval, *Nash v. Norment*, 5 Mo. App. 545, and *Jones on Chattel Mortgages*, sec. 178, where the same doctrine is asserted.

The principle of that case had been previously intimated, if

not expressed, in *Hawson v. Tootle*, 72 Mo. 632, and has been again asserted and approved in *Petring v. Christer*, 90 Id. 650. To the same effect is *Cameron v. Marvin*, 26 Kan. 612. Notwithstanding the agreement that the manufacturing company might sell the stock in trade in the usual course of business, the deed of trust was valid as between the parties thereto. No actual fraud was intended by the parties, and it would seem that if the objectionable parol agreement was abrogated before the rights of creditors attached, the deed of trust ought to be held valid from that time on, even as to creditors. An entirely new pledge, freed from such agreement, would have been valid. The effect of taking possession under the deed of trust for the purposes therein specified, with the consent of the assignee, was to abrogate the previous objectionable parol agreement. At all events, the question in this case is settled by the cases last cited; and they will not be disturbed. The judgment is therefore affirmed.

CHATTEL MORTGAGE AUTHORIZING THE MORTGAGOR TO RETAIN the possession of the property, and use and enjoy the same as in the usual course of trade, is generally void as to subsequent attaching creditors, while the mortgagor retains possession: *Barnet v. Fergus*, 51 Ill. 352; 99 Am. Dec. 547, and note 550; *Place v. Langworthy*, 13 Wis. 629; 80 Am. Dec. 758, and note; *Orton v. Orton*, 7 Or. 478; 33 Am. Rep. 717; *Davenport v. Foulke*, 68 Ind. 392; 34 Am. Rep. 265; *Peiser v. Petcolas*, 50 Tex. 638; 32 Am. Rep. 621; *Lund v. Fletcher*, 39 Ark. 325; 43 Am. Rep. 270; *Benedict v. Renfro*, 75 Ala. 121; 51 Am. Rep. 429. But see *Frankhouser v. Ellett*, 22 Kan. 127; 31 Am. Rep. 171; *Clark v. Hyman*, 55 Iowa, 14; 39 Am. Rep. 160. If the mortgagee takes possession under the mortgage before the lien of attaching creditors attaches, he is protected, though the mortgagor remained in the store and sold the goods for the mortgagee: *Read v. Wilson*, 22 Ill. 377; 74 Am. Dec. 159, note 161; *Jennings v. McIlroy*, 42 Ark. 236; 48 Am. Rep. 61. In *Roundy v. Converse*, 71 Wis. 524, 5 Am. St. Rep. 240, it was held that a chattel mortgage which authorized the mortgagor to sell the goods mortgaged, and with the proceeds to purchase others to be subject to the mortgage in their stead, was valid, though as to such subsequently acquired goods it might be effective only as a license to seize such goods.

BARTLETT v. SPARKMAN.

[55 MISSOURI, 188.]

AGENCY — PRINCIPAL BOUND BY AGENT'S ACTS IN EMERGENCY. — Where an agent is directed to get a certain physician, but, being unable to procure him, employs another instead, the emergency is such as to bind the principal, though he told the latter physician when he arrived at his destination that his services were not required, as the trouble was over.

L. D. Grove, for the appellant.

S. A. Standard, for the respondent.

NORTON, C. J. This action was commenced before a justice of the peace on an account for professional services of plaintiff as a physician.

The account sued upon is as follows:—

“Thad Sparkman, Dr., to G. T. Bartlett.

“April 12, 1881. To one visit..... \$10.00.”

At the May term, 1884, of the Butler County circuit court, to which the cause had been taken by appeal, a jury was impaneled, and at the close of the evidence the court instructed the jury “that, under the proof, plaintiff is not entitled to recover,” whereupon the jury returned a verdict for defendant, and judgment was entered against plaintiff, from which he has appealed, and assigns for error the action of the court in giving the aforesaid instruction.

The following is all the evidence introduced on the trial:—

John Sparkman testified as follows: “I am a brother of the defendant. In April, 1881, the defendant told me his wife was sick, and sent me after the doctor; he told me to get Dr. McCowen; I went and could not get him; Dr. Bartlett was then my next choice and I went and saw Dr. Bartlett and got him; he and I rode out together; I went to within about three miles of defendant's house; I then turned off and the doctor went on. It is about fourteen miles from Poplar Bluff to defendant's house. I told the doctor that the defendant wanted him, as his wife was sick.” On his cross-examination, witness said: “The doctor acted as if he was drunk; I went to the saloon, and we each drank one glass of beer, and on the way up the doctor took out a bottle and drank once; I drank out of the same bottle; it was whisky and something else; it tasted sweet.”

B. C. Jones testified: “I am a physician; to go out in the country on a professional call, it is worth ten dollars to go a

distance of twelve or fourteen miles; the plaintiff is a practicing physician."

Plaintiff in his own behalf testified as follows: "John Sparkman, the brother of defendant, came to me to go and see the defendant's wife, who he said was sick; I went with him and drove up in the lawn near the house, where we usually get out to go in, and the defendant came out and said to me, 'Doctor, we don't need your services now, for the trouble is all over.' I then drove off."

The action of the court in giving the instruction complained of was doubtless based on the well-established general doctrine that the acts of a special agent with special authority, not done in pursuance of the authority, or done in excess of it, are not binding upon his principal, unless ratified by him with full knowledge of the facts and circumstances. The rule, however, is not of universal application. In 1 *Wait's Actions and Defenses*, page 232, section 12, it is said: "Although, as a general rule, an agent is required to conform to his instructions or authority, yet there may be instances in which a strict and literal adherence to their terms would defeat the object of the agency. There may arise such new and unexpected emergencies and necessities as will justify the agent in assuming extraordinary powers, which, if done in good faith, and with sound discretion, will bind the principal." So it is said, in *Story on Agency*, section 141, "that, although the powers of agents are, ordinarily, limited to particular acts, yet extraordinary emergencies may arise in which a person who is an agent may, from the very necessities of the case, be justified in assuming extraordinary powers; and his acts, when fairly done under such circumstances, will be binding on his principal." See *Id.*, secs. 85, 237, 193.

The facts in evidence bring this case within the operation of the principle above enunciated. The object of the agency was to procure a physician for the sick wife of defendant, and, while the agent was directed to get Dr. McCowen, his inability to procure him created an emergency which required him either to ride fourteen miles back for further instruction or procure the services of some other physician. Besides this, defendant when plaintiff reached his house did not repudiate the act of his agent by saying, Your services are not wanted, because I never authorized you to be employed; but, on the contrary, virtually ratified the act by saying, Your services are not required now, because the trouble is over with. We

think the court erred in taking the case from the jury, and that it should have been submitted to the under proper instructions.

Judgment reversed and cause remanded.

GENERAL RULE IS, THAT PRINCIPAL IS NOT BOUND BY ACT OF AGENT beyond scope of his authority, and that persons dealing with the agent are bound to inquire into his authority: *Lister v. Allen*, 31 Md. 543; 100 Am. Dec. 78; *Bond v. Pontiac etc. R. R. Co.*, 62 Mich. 643; 4 Am. St. Rep. 886. The principal case is a novel one, and no parallel case can be found. In *Mayberry v. Chicago etc. R. R. Co.*, 75 Mo. 592, cited in the note to *Huntley v. Mathias*, 47 Am. Rep. 520, it was held that a physician who was authorized to treat persons injured by the trains of the company, and to buy medicines on the credit of the company, had no power to bind the company for board, lodging, attendance, and nursing of persons so injured.

AGENT, WHEN MAY DISREGARD ORDERS, OWING TO UNEXPECTED EMERGENCY, AND STILL BIND HIS PRINCIPAL. — Although the general rule is, that an agent must follow and adhere to his instructions and authority, still cases may and do arise where a literal conformation to their terms would defeat the very objects of the agency. So where, from the necessities of the case, without the agent's fault or neglect, some sudden and unexpected emergency or extraordinary or supervening necessity arises, or some unforeseen event happens, which will not admit of delay for consultation or communication with the principal, if the agent, exercising prudence and sound discretion, in good faith adopts the course which seems best to him under all the circumstances as they exist, he will be justified, and his acts will bind his principal, though subsequent events may demonstrate that some other course would have been better: *Foster v. Smith*, 2 Coldw. 474; 88 Am. Dec. 604; *Williams v. Shackelford*, 16 Ala. 318; *Drummond v. Wood*, 2 Caines, 310; *Loitard v. Graves*, 3 Id. 225; *Forrestier v. Bordman*, 1 Story, 43; *Lawler v. Keaquick*, 1 Johns. Cas. 175; *Judson v. Sturges*, 5 Day, 556; *Bernard v. Maury & Co.*, 20 Gratt. 434-438; *Harter v. Blanchard*, 64 Barb. 617; *Gould v. Rich*, 7 Met. 538; *Dusar v. Perl*, 4 Binn. 361; *Jervis v. Hoyt*, 2 Hun, 637, where it is said that emergencies may arise in which an agent or factor may, from the necessities of the case, be justified in assuming extraordinary powers, and his acts, fairly done under the circumstances, will bind the principal. In *Forrestier v. Bordman*, 1 Story, 43-51, it is said: "Now, I take it to be clear that if, by some sudden emergency or supervening necessity, or other unexpected event, it becomes impossible for the supercargo to comply with the exact terms of his instructions, or a literal compliance therewith would frustrate the objects of the owner and sacrifice his interests, it becomes the duty of the supercargo, under the circumstances, to do the best he can, in the exercise of a sound discretion. He becomes, in such a case, an agent from necessity for the owner. In all voyages of this sort there is an implied authority to act for the interest and benefit of the owner in all cases of unforeseen necessity and emergency created by operation and intendment of law." This rule is adopted and enlarged upon in *Greenleaf v. Moody*, 13 Allen, 363, where it is held that in unforeseen circumstances of necessity or great urgency a factor has an implied authority to act for his principal, irrespective of his instructions or the ordinary usages of trade, in adjusting contracts and claims, and disposing of property; and a factor who has so acted in good faith and with good discretion, under the circumstances as they then appeared, will not be

liable for the consequences, although it turns out that his course was disadvantageous to his principal. The facts in this case were, that the owner of hay in Maine consigned it to a party in New Orleans, to be sold during the war of the Rebellion. The United States military forces bought a portion, and agreed to pay cash for it, but afterwards refused to pay except in government certificates at par. The consignee, acting in good faith and according to the custom of brokers and factors, accepted such payment, and afterwards sold the certificates at ninety-three cents on the dollar, their then market value. The consignor was ignorant of such custom, but the court held that the agent was not liable to his principal for the seven per cent discount on the certificates. So in *Millbank v. Dentons*, 21 N. Y. 383, where the instructions of an American owner of flour to his factor at Liverpool were to withhold it from sale until an expected act of Parliament had produced its results upon the market, it was held that the factor was not chargeable with a breach of instructions in selling prematurely, if he waited a considerable time after the passage of the act, and then sold in good faith and with reasonable prudence; and that under his instructions the factor had the discretion, after the market had remained a considerable time under the influence of the new law, to judge whether the measure had produced its full effect upon the market, and was not liable for error of judgment in that respect. And again, where a ship meets with disaster at sea, and the master in good faith, acting for the common benefit of all interested, and without intent to sacrifice the interest of any person concerned in the vessel or its cargo for that of another, secures the safety of the whole, and thereby incurs great expense, the owner of the cargo is liable to contribution in general average for such expense, without regard to the question whether it might not have been lessened had the cargo been separated from the vessel: *Goodwillie v. McCarthy*, 45 Ill. 186. Thus in *Harter v. Blanchard*, 64 Barb. 617, where the naked bailee of a horse took him to pasture without consideration, and while in his keeping the horse had his leg broken, it was held that the bailee had implied authority to contract, on behalf of the bailor, with a competent farrier having suitable accommodation for the care and keeping of the horse, and such contract is binding on the principal, at least until he can be informed of the injury to the horse, and has opportunity to make other arrangements for his care and custody. In *Williams v. Shackelford*, 16 Ala. 318, the agent was authorized by his principal to receive and sell his slave, who was in the custody of a third person. The agent received the slave, and tried to sell him, but failed. He then endeavored to hire him out, but could not do so, and not being instructed to take the slave with him, he left him with the party from whom he had received him free of hire until the principal could be informed of the circumstances, and make other arrangements; and it was held a case of emergency, that the agent did not depart from the line of his duty, and that the holder of the slave was not liable for his hire. Where goods were shipped on a vessel, and consigned to the master under instructions to sell in France, but the master, not being able to find a purchaser, left the goods and returned to New York, the court held that, having acted *bona fide*, he was not responsible to the owner: *Lawler v. Keaquick*, 1 Johns. Cas. 175. An agent not generally authorized to insure may, in unforeseen emergencies, to prevent irreparable loss to his principal, overstep his instructions, and insure his principal's property: *Wol v. Horncastle*, 1 Bos. & P. 323.

OWENS v. KANSAS CITY, ST. JOSEPH, AND COUNCIL BLUFFS RAILWAY COMPANY.

[95 MISSOURI, 168.]

PERSONAL EXAMINATION OF PLAINTIFF. — In an action for damages for personal injury, defendant has no absolute right to have a personal examination of plaintiff; that is entirely within the discretion of the court, the exercise of which discretion will not be interfered with unless manifestly abused.

INSTRUCTIONS — DEPARTURE FROM PETITION. — Where petition in action against railroad company for personal injury alleges negligence in not stopping a reasonable time for plaintiff to alight, and negligence in putting him off, also an assault on him by defendant's agent, and the instructions authorize a recovery upon finding the negligence alleged, but are silent as to the assault, they are not erroneous, as a departure from the petition, especially if they present the real issue made by the evidence.

INSTRUCTIONS ARE TO BE TAKEN as a whole, and if they present all the issues made by the evidence, are not open to objection as erroneous. There is no necessity for qualifying each instruction by an express reference to the others.

WITNESS, WILLFULLY FALSE TESTIMONY BY, MAY BE DISREGARDED. — Where witness willfully swears falsely to any material matter, the jury may disregard the whole of his evidence.

NEGLECT — DAMAGES. — **IN ACTION AGAINST A RAILROAD COMPANY** for injuries received in being negligently and forcibly pulled from the cars, the plaintiff is entitled to recover upon proof of the negligence, though an invalid, and the injuries may have been aggravated and rendered more difficult to cure by reason of ill health; and it is no defense to say that the injuries would not have occurred, or would not have been so great, had the passenger been in good health.

NEGLECT — DAMAGES. — **IN ACTION AGAINST RAILROAD COMPANY** for injuries received through its negligence, plaintiff may describe the injuries received, and the evidence cannot be excluded because plaintiff testifies that the nerves of her head, side, and leg were paralyzed. It is not in the nature of expert evidence.

EVIDENCE. — **DECLARATIONS OF PARTY TO SUIT** can be offered in evidence to impeach him without laying any foundation therefor.

EVIDENCE. — **DECLARATIONS OF PARTY TO SUIT**, purporting to be contained in an uncompleted deposition, are not admissible to impeach him, when he denies making such declarations, and the opposing party does not show, or offer to show, that such declarations were made by him.

Strong and Mosman, J. D. Shewalter, and R. P. C. Wilson,
for the appellant.

Wallace and Chiles, Woodson and Woodson, Green and Burnes, Anderson and Carmack, and S. C. Woodson, for the respondents.

BLACK, J. This is a suit for personal injuries to the plaintiff Mrs. Owens, wife of the other plaintiff. She prevailed in

the court below, and the defendant appealed. On the 20th of November, 1883, she and her daughter were passengers on one of the defendant's trains from Kansas City to Beverly. The petition, which is very lengthy, states, in substance, that defendant negligently failed and refused to stop the train at Beverly long enough to allow the plaintiff a reasonable time to alight in safety; that as soon as the train stopped she stepped to the door of the car to get off; that when she arrived at the car platform the train was negligently put in motion by defendant; that the brakeman, knowing the train was in motion, unlawfully assaulted, seized, and took hold of her, and violently and negligently pulled and threw her from the cars to the depot platform, inflicting upon her bruises, wounds, etc.; that on account of negligently putting the train in motion, and negligently pulling and throwing her from the platform of the car, she has suffered pain, etc. The answer is a general denial, with the further defense that plaintiff was guilty of contributory negligence in attempting to get off the train when in motion.

The evidence for the plaintiff tends to show that when the train began to slack up, the brakeman said: "This is Beverly"; that he picked up the plaintiff's valise and walked towards the car door; that the daughter followed him, and plaintiff followed the daughter; that the brakeman assisted the girl to the depot platform. Plaintiff says when she got to the platform two persons were getting on the car, so that she stepped through on the platform of the car in front; that she took hold of the iron rod that extended around the car; that the train was then moving faster; that the brakeman, who was on the depot platform, walking to keep up with the car, reached up and caught her between the elbow and wrist and pulled her to the depot platform; that she then became unconscious, from injuries to her head, arm, hip, and side. This evidence is corroborated by that of the daughter; and other evidence is, that the train stopped from ten seconds to a minute only. The evidence for the defendant tends to show that the train stopped for the usual and for a reasonable time; that plaintiff attempted to get off after the train had started, and that she fell from the platform of the car; that the brakeman warned her not to get off, and at the same time was trying to signal the engineer to stop.

1. The suit was commenced in the Platte circuit court, and transferred to the Lafayette circuit court by change of venue.

There defendant, at the March term, 1884, filed a motion asking the court to require plaintiff to submit her person to an examination by a commission of medical experts, to be appointed by the court, in order to determine the character of the injuries, and to what extent they were due to the accident. This motion was not determined until the term at which the cause was tried, April, 1885, when it was overruled, and the defendant excepted. It was in substance held in *Shepard v. Railroad*, 85 Mo. 629, that the defendant has no absolute right to have a personal examination; that it is a matter in which the court has a discretion, the exercise of which will not be interfered with, unless manifestly abused. Of course, the court is not bound to refuse or to grant the motion, to the full extent of the prayer. Its order may be molded to suit the circumstances of the case. In that case the plaintiff, a lady, had once submitted to an examination by one physician, and offered to submit to an examination by another eminent and reputable surgeon; but with this the defendant was not satisfied. Under these circumstances, we held in that case that there was no error in refusing the motion. In the later case of *Sidekum v. Railroad*, 93 Mo. 400, it was held there was no error in refusing such a motion. In that case, the trial court was of the opinion that an examination was not necessary in order to ascertain the real condition of the plaintiff and the nature and extent of her injuries. This court, upon an examination of the evidence, reached the same conclusion. The ruling is certainly based in part upon that ground. The power of the court to make and enforce an order for the personal examination of the injured party must be taken as established in this state, as it is in many others: *Schroeder v. Railroad*, 47 Iowa, 375; *White v. Railroad*, 61 Wis. 536; *Hatfield v. Railroad*, 83 Minn. 180; *Railroad v. Thul*, 29 Kan. 466. The court might, with propriety, have made an order for the examination of the plaintiff in this case, by a disinterested reputable physician, in the presence of her husband, if desired, and lady friends. But the real question here is, whether there has been an abuse of the discretion lodged in the trial court.

In the plaintiff's deposition, taken and filed before this motion was made, she says that when the brakeman pulled her from the car step, her head, left arm, and hip struck against the car; that because of the injuries then received she has lost the use of her left arm and her left leg; that the arm is par-

alyzed; that since then she has not been able to stand on her feet, whereas before she was able to attend to her household duties. She was cross-examined for many days and at great length, answering between five and six hundred questions, often in the presence of physicians employed and taken to the bedroom by defendant, but not introduced to her. This examination shows that she received an injury in the back when thirteen years of age; that a few years before the accident in question she went to Denver for her health; that while there her shoulder was dislocated; that she was subject to rheumatism in her left side and arm, and suffered from what she terms rheumatic neuralgia, and had been under the charge of a physician for years. Much other evidence was offered, on the one side and the other, disclosing the state of her health, both before and after she received the injuries complained of. This evidence was given by persons who could and did detail facts within their observation. Some of it goes to show that there was no perfect paralysis, but that she was suffering greatly from the injuries cannot be doubted. A medical examination could add no information as to her previous health and but little to her subsequent condition. It is suggested that she represents her condition to be worse than it really is, and that she has misled her two physicians, who were examined and cross-examined at length. We discover no real ground for such suggestion, and if any there is, it was matter of observation to the jury. Since the evidence easily attainable, and really in the case, shows a history of her health for a large portion of her life, and also shows her physical condition since the accident, and what acts she can do and what she cannot, we will not disturb the ruling of the trial court.

2. The court, in the first instruction for plaintiff, in substance, said that if, after the station was announced by the brakeman, the plaintiff, with reasonable and usual expedition, went to the platform of the car, and that, before she could get off, the train was started, and while on the car step waiting for the car to stop, the brakeman took hold of her arm and pulled her to the depot platform, and she was injured, etc., then she was entitled to recover. The seventh instruction declares that it was the duty of the defendant to stop the train a reasonable time for the plaintiff to get off,—i. e., such a time as is required for a person using ordinary diligence to get off; and if the train was started before plaintiff had such a reason-

able time, then defendant was guilty of negligence; and if the jury further believed that the brakeman pulled her from the car, while in motion, to the depot platform, and she was injured, then, etc.

The objection to these instructions, that they allow a recovery upon proof alone of negligence in failing to stop a reasonable time, is not well founded; for in both instructions the jury were required to find the further fact that the brakeman pulled her from the car while in motion. It is true, no finding is, in terms, required that he negligently pulled her from the car; but if the train started without giving her time to get off, and the brakeman pulled her off while the car was in motion, it was a negligent act. The contrary theory, presented by the defendant's evidence, namely, that she persisted in getting off, though warned not to do so, fell, and was caught by the brakeman, was presented by instructions given at the request of the defendant. The evidence of the defendant is an out-and-out denial that the brakeman pulled her off at all. The instructions present the real issue made by the evidence.

The next objection to these instructions is, that the plaintiff cannot sue for an assault, and recover for negligence in failing to stop the train. The petition does make some extravagant averments; but notwithstanding it charges an assault by the servant, it also in terms charges negligence in not stopping the train a reasonable time, and negligence on the part of the servant in pulling her off. The instructions cannot be said to be a departure from the petition. The petition contains all that is in the instructions, and more too, and it follows that it is not a case of declaring upon one cause of action, and a recovery upon another: *Conway v. Reed*, 66 Mo. 350.

The final objection to these two instructions is, that they ignore the defense of contributory negligence, because they do not conclude with some such words as "provided the plaintiff was not negligent." On this defense the court gave a number of instructions, one of which is as follows: "3. If the jury believe from the evidence that plaintiff recklessly or negligently attempted to alight, or jump from the train, and the brakeman either tried to keep her from so doing, or to assist her to alight after she voluntarily attempted to do so, and that he tried to keep her from getting off, then the jury will find for defendant, no matter what her injuries may have been, or what her condition now is."

To say, with these instructions, that the jury could find for

plaintiff, without regard to negligence on her part, is little short of charging them with corruption. The instructions are to be taken as a whole, are so taken by men of common understanding, and can be understood in no other way. There is no necessity for qualifying each by an express reference to the others. They thus qualify themselves, when in the form these instructions are. The contrary ruling in *Sullivan v. Railroad*, 88 Mo. 182, is not to be followed.

3. The instruction, that if any witness had willfully sworn falsely to any material matter, the jury are at liberty to disregard the whole of his evidence, is without valid objection. It is sufficient that the witness either willfully or knowingly swore falsely: *State v. Palmer*, 88 Mo. 568; *White v. Maxey*, 64 Id. 552. Defendant asked and had given a like instruction, and it is in no position to say there was no evidence to justify the giving of such an instruction.

4. The fourth and eighth instructions are in substance the same, and may be considered together. The eighth is, that if plaintiff was pulled off the car against her will by defendant's servant, acting within the scope of his employment, and that she thereby received injuries, "then the defendant is responsible for all the ill effects which naturally and necessarily follow the injuries in the condition of health in which plaintiff was at the time; and it is no defense that the injuries may have been aggravated and rendered more difficult to cure by reason of plaintiff's state of health, or that, by reason of latent disease, the injuries were rendered more serious to her than they would have been to a person in robust health." This instruction, it will be seen, is almost the same as that in the case of *Brown v. Railroad*, 66 Mo. 588, which was approved by this court. There, it is true, the instruction was predicated upon the fact that plaintiff was "unlawfully and willfully put off the car." But if the plaintiff was negligently pulled off the car, she has the right to be compensated for all the injuries which she would not have sustained had due care been exercised. Invalids, as well as persons in robust health, are entitled to the exercise of the highest degree of care on the part of the common carrier. It is no answer to say that the injuries would not have occurred, or would not have been so great, had the passenger been in good health: *Allison v. Railroad*, 42 Iowa, 274.

5. It was competent for the plaintiff to describe the injuries which she received, and it is no ground for excluding this evi-

dence because she says the nerves of her head, side, and left limb were paralyzed. It is not in the nature of expert evidence.

6. When the plaintiff's deposition was taken, and as a part of the cross-examination, counsel for the defendant read over twelve or fourteen questions and answers, of which the following are a part:—

Q. "I will ask you if, during your suffering from inflammatory rheumatism, you were not in the habit of using opiates,—morphia?" A. "No, sir; not to excess. I could take morphia into the stomach, and it relieved it."

Q. "I will ask you if you did not take it regularly?" A. "Not for my shoulder."

She was then asked and made answer as follows: Q. "Is not the foregoing a true and literal statement of questions and your answers made thereto in this room on the first day that your deposition was attempted to be taken in this case? and was not that statement made in the presence of Charles A. Blair, a stenographer, who at the time was, by agreement of parties, present for making such stenographic report?" A. "It is false from beginning to end. It is not a true statement."

The court, on motion of the plaintiff, excluded all of the above-described portion of the deposition, and defendant excepted. It seems a previous effort had been made to take plaintiff's deposition by her attorneys, but it had not been completed, signed, or certified, and hence not filed in this cause. The plaintiff, throughout her examination read in evidence, concedes that she had used morphine, but says it was by way of injection only. Now, in the first place, as the witness was a party to the suit, it was not necessary to ask these questions to lay a foundation to impeach her evidence. Her declarations could be offered in evidence as against her without laying any foundation therefor. Again, this portion of the deposition was of no benefit to defendant, unless followed by proof that she did make the alleged answers to the alleged questions. The defendant did not show or offer to show that she made any such statements; and the portions of the deposition in question were properly excluded.

7. Many other questions are made in the briefs for appellant, but they are less substantial than those before considered, and will not be followed out in detail in this opinion.

The case seems to have been fairly tried, and the judgment is affirmed.

DEFENDANT HAS NO ABSOLUTE RIGHT TO HAVE PHYSICAL EXAMINATION OF PLAINTIFF: See *Stout City v. Finlayson*, 16 Neb. 578; 49 Am. Rep. 734, and note 726-729; *Sideham v. Wabash etc. R'y Co.*, 93 Mo. 400; 3 Am. St. Rep. 549, and note 554-557.

INSTRUCTIONS MUST BE TAKEN AS A WHOLE, and if they express the law applicable to the issues made by the evidence, they are not open to objection or erroneous: *Indianapolis etc. R'y Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578, and note. To the same effect is *State v. McCahill*, 72 Ind. 111.

WHEN WITNESS HAS WILLFULLY SWORN FAIRLY IN REGARD TO MATERIAL MATTER, the whole of his testimony is to be regarded as false: *Dunn v. People*, 29 N. Y. 523; 86 Am. Dec. 319, and note 330, 331; *Stofer v. State*, 15 Ohio St. 47; 86 Am. Dec. 470; *State v. Hickam*, 95 Mo. 322; *post*, p. 54.

IN ORDER TO IMPROACH WITNESS BY PRIOR DECLARATIONS, proper foundation must be laid by asking him whether he made such declarations at a certain time and place, under certain circumstances: Note to *Allen v. State*, 73 Am. Dec. 763 et seq.; and *Higgins v. Carlton*, 28 Md. 115; 92 Am. Dec. 666; *Smith v. Cooke*, 31 Md. 174; 100 Am. Dec. 58. To the same effect is *Baker v. State*, 69 Wis. 32; and it is further held in this case that a witness cannot be impeached by so contradicting answers as to matters not pertinent to the issue.

RIGHT OF RAILROAD COMPANY TO EJECT PASSENGERS, and manner in which right should be exercised: See note to *Chicago etc. R. R. Co. v. Parks*, 68 Am. Dec. 572.

AS TO WHETHER RAILROADS OWE SPECIAL DUTY OR CARE TO SICK, aged, or feeble passengers, see the note to *New Orleans R. R. Co. v. Statham*, 97 Am. Dec. 499, 500.

STATE v. WILLIAMS.

[95 MISSOURI, 347.]

EVIDENCE. — IN LARCENY, the intent to steal by the taking is the *graves* men of the crime, and the defendant may testify as to the intent with which the act is done, where such intent is material.

1D. — WHEN DEFENDANT IS ON TRIAL FOR LARCENY of a cow, he may testify that he purchased a due-bill on the owner of the cow, and having been informed and believing that such owner would let the cow go on such bill, he took her, thinking he had the right to do so, and with no intent to steal.

S. M. Chapman, for the appellant.

B. G. Boone, attorney-general, for the state.

NORTON, C. J. Defendant was indicted by the grand jury of Dunklin County, and charged with grand larceny in stealing a cow, the property of one William Rambou. He was tried and convicted, and from the judgment of conviction has appealed to this court.

The evidence tended to show that Rambou had a cow in a

lot on the farm of defendant, and about sunrise defendant, accompanied by his brother, took the cow from said lot and removed her to another lot on his farm on a public road, where she remained a day or two, and was then removed and tied in the woods; that defendant at the time of the taking told his brother to tell the "folks" that he had taken the cow. The defense relied upon was that defendant had bought a due-bill on Rambou, and at the time of the purchase was informed that Rambou was willing to let the cow go in payment thereof, and that under the belief that this was so, he took the cow without any intent to steal. In cases of larceny, the intent to steal by the taking is the *gravamen* of the offense, and it is settled by the following cases that it is competent for the defendant to testify as to the intent with which an act was done, where the intent with which it was done is material: *State v. Banks*, 73 Mo. 592; *State v. Palmer*, 88 Id. 568. The principle above stated was ignored by the trial court, in its refusal to allow defendant while testifying to state that he purchased a due-bill on Rambou, and having been informed and believing that Rambou would let the cow go on the due-bill, he went and got her, believing that he had a right to do so, and with no intent to steal the cow or do a wrong.

The act of defendant in taking the cow, in the light of the evidence, is more in the nature of trespass than larceny; and for the error above noted, the judgment is hereby reversed and the cause remanded.

FELONIOUS INTENT IS ESSENTIAL INGREDIENT of the crime of larceny, and it must exist at the time of the taking, for no subsequent felonious intent will render the previous taking felonious: *Dignowitty v. State*, 17 Tex. 521; 67 Am. Dec. 670, note 678; *Lancaster v. State*, 3 Coldw. 340; 91 Am. Dec. 286, note 291.

INTENT TO STEAL IS GRAVAMEN OF CRIME OF LARCENY: See note to *State v. Homes*, 57 Am. Dec. 271 et seq.; *Billard v. State*, 30 Tex. 367; 94 Am. Dec. 317; and where property is openly and notoriously taken, the consequent presumption that there was no felonious intent must be rebutted by the clearest evidence in order to convict: *Black v. State*, 83 Ala. 81; 4 Am. St. Rep. 691. Where the *gravamen* of the crime consists in the intent alone, the jury may infer the intent from the circumstances: *State v. McBryde*, 97 N. C. 393. In *People v. Raschke*, 73 Cal. 378, an instruction that if defendant obtained goods by false representations, without any change in the title, with the intention to convert them to his use, and did so convert them, he is guilty, was adjudged erroneous as omitting the element of felonious intent to steal at the time possession was obtained.

BUNN v. LINDSAY.

[95 MISSOURI, 250.]

JUDGMENT LIEN NOT DEPLACED BY HOMESTEAD ENTRY.—When judgment lien has attached to land, it cannot be defeated or displaced by subsequent occupation as a homestead.

HOMESTEAD—EFFECT OF SHERIFF'S SALE MADE WITHOUT FIRST SETTING OFF.—Where judgment debtor is entitled to a homestead exempt from sale under execution, and the sheriff fails to set it off at such sale, the latter is not for such reason void, but the fee passes to the purchaser, subject to the homestead right, which is not affected by the sale.

SUBROGATION.—DEMAND OF CREDITOR paid with money of third person, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished, and the doctrine of subrogation will be applied only when the person claiming its benefit has been compelled to pay the debt of a third person in order to protect his own rights, or to save his own property.

RECORDED JUDGMENT CONCERNING LAND IS NOTICE to subsequent purchasers, in the absence of fraud and misrepresentation; and equity will not relieve against negligence in failing to examine the record, by interfering with the legal rights of others who are without fault.

Ramey and Brown, and J. F. Harwood, for the appellant.

S. H. Corn and T. E. Turney, for the respondents.

BRACE, J. On the fifth day of September, 1873, John M. Lindsay, being the owner in fee of the undivided half of section 8, township 59, range 32, in De Kalb County, executed his note of that date to the St. Joseph Building Company for the sum of six thousand dollars; and on the same day, with his wife, executed a deed of trust on said undivided half of said section to secure the payment of said note, which was recorded on the ninth day of September, 1873, in said county. On the first day of December, 1873, the said Lindsay executed his note, payable to the order of Joel T. Smith, six months after date, for the sum of \$1,750. About the 1st of July, 1874, Lindsay applied to one House, at Cameron, Missouri, who was the agent of plaintiff, a money-lender, then resident in Bloomington, Illinois, for a loan of two thousand five hundred dollars to pay off said deed of trust. House, at the instance of plaintiff, examined the records of De Kalb County, made an abstract of Lindsay's title to said real estate, showing that there were no encumbrances on said property except said deed of trust, and forwarded it to the plaintiff, informing him that the money to be borrowed was to be used in paying off the debt, secured by said deed of trust. Thereupon plaintiff prepared three bonds or notes and a deed of trust on said

real estate to be executed by said Lindsay, each bearing date the 1st of July, 1874, two of the notes for one thousand dollars each and one for five hundred dollars, payable to plaintiff on the 1st of July, 1879, at the Mercantile National Bank at Hartford, with interest from date at the rate of ten per cent per annum, payable semi-annually on the first days of January and July, the interest to bear the same rate of interest as the principal after due, as evidenced by ten interest coupons attached to each of said notes or bonds, and all secured by said deed of trust to one Powell, with power of sale in case of any default in payment of principal or interest, and forwarded said notes and deed of trust to his said agent to "complete the transaction," who thereupon entered into negotiations with the building company to pay off their claim.

On the 12th of December, 1874, Gideon C. Paramore recovered judgment in the circuit court of Clinton County against Lindsay on the Smith note for \$1,972, and on the 15th of December, 1874, filed a transcript of said judgment in the office of the clerk of the circuit court of De Kalb County, which was thereupon duly docketed and recorded by said clerk. On the 23d of January, 1875, Lindsay signed the bonds, and he and his wife executed and acknowledged the deed of trust prepared by plaintiff, and the same were delivered to House, his agent, who thereupon placed plaintiff's draft on New York for two thousand five hundred dollars in the Cameron Deposit Bank, to be delivered to the St. Joseph Building Company upon the surrender by them of Lindsay's note and a release of their trust deed.

On the 25th of January, 1875, the building company in Buchanan County executed and acknowledged a release and satisfaction of their trust deed to Lindsay, in consideration of the sum of \$2,510 paid by him, and on the 28th of January, 1878, this deed of release and Lindsay's deed of trust to Powell to secure plaintiff's bonds were at the same time filed for record in the office of the recorder of De Kalb County. In March, 1876, Lindsay, who before that time had been residing on a forty-acre tract of land adjoining said section 8, moved into a house on said section which he had previously built, and continued to reside there from that time with his family until 1880, when he removed from the premises, and left the state. On the 6th of December, 1877, Paramore caused an execution to be issued on his judgment, which, on the 10th of December, 1877, was levied on all his interest in said real

estate, and by virtue thereof the same was, on the 8th of October, 1878, sold, and he became the purchaser thereof at the price of \$205, and received the sheriff's deed therefor. Notice was given at the sale that Lindsay claimed a homestead in the land, and that plaintiff claimed a lien upon the land superior to Paramore's judgment to the amount of two thousand five hundred dollars, which he had paid to extinguish the St. Joseph Building Company's lien for six thousand dollars. The testimony tended to show that at the time of the sale the land was worth ten dollars per acre.

At the October term, 1878, of the Clinton circuit court, to which the execution was returned, Lindsay filed a motion to set aside the sale for the reason that a homestead in said land had not been set off to him by the sheriff prior thereto, which motion was by him withdrawn at the October term of said court, 1879. On the 10th of September, 1879, Paramore, by general warranty deed, conveyed said land to the defendant, James B. Leisenrig, for the expressed consideration of two thousand five hundred dollars.

At the April term, 1884, of the De Kalb circuit court plaintiff instituted this suit, in his petition charging that defendant Leisenrig paid no consideration for the land, and received his deed therefor with notice of the foregoing facts, and that the sale to Paramore was void for the reason that the sheriff failed to set off Lindsay's homestead, and praying that he be subrogated to all the rights and remedies the St. Joseph Building Company had by virtue of their deed of trust against said land to the extent of two thousand five hundred dollars, with interest thereon at the rate of ten per cent per annum from the date of the payment of that sum to the building company, and that the same be declared a lien upon said land against defendants; that their equity of redemption be foreclosed, and the land sold to satisfy such lien. Defendants Lindsay and Paramore were not served, and did not answer. Defendant Leisenrig answered, admitting the allegations of the petition in regard to the ownership of the land by Lindsay, the recovery of the judgment by Paramore, the filing of the transcript thereof, the issue and levy of the execution and sale and purchase by Paramore, and averred that he purchased said land of Paramore for the sum of two thousand five hundred dollars, who conveyed the same to him by general warranty deed, and denied all the other allegations of the petition. The court found the issues for the defendant, and dismissed the bill.

On the 15th of December, 1874, Paramore's judgment, a transcript of which was on that day filed in the office of the clerk of the circuit court of De Kalb County, became a lien on the undivided half-interest of Lindsey in section 8. Lindsay with his family at that time was residing elsewhere. In March, 1876, he first moved with his family upon the section, and then first occupied the house which he had previously built thereon as a home. His right of homestead exemption was then for the first time impressed upon the land which before that time he owned but had never occupied as a homestead. The right of homestead which he then acquired by such occupancy was subsequent and subject to the prior lien of Paramore's judgment, and could not be by him asserted against it. He had no homestead right exempt from sale under the execution issued upon that judgment which the sheriff could be required to set off before sale. The lien of the judgment, having attached to all his interest in the one undivided half of the section, could not be displaced or defeated by the subsequent occupation of it by him as a homestead: *Elston v. Robinson*, 21 Iowa, 581; 23 Id. 808; *Thompson on Homesteads*, secs. 241, 246; *Finnegan v. Prindoville*, 83 Mo. 517.

If, however, Lindsay had been entitled to a homestead exempt from sale under execution upon this judgment and the sheriff failed to set it off, the sale would not have been void by reason of such failure: *Crisp v. Crisp*, 86 Mo. 630. The fee would pass to the purchaser subject to his right of homestead (*Black v. Curran*, 14 Wall. 463), which right would not be in any manner affected by the sale, not could the purchaser at such sale get possession of any part of the premises without setting off that homestead so long as it was occupied by him as such; and doubtless having the right to have the same set off before sale, the failure of the officer to do so would afford the homestead occupant good ground for having the sale set aside at the return term of the execution. This right Lindsay proceeded to assert at the return term of the execution, but afterwards withdrew his claim, abandoned the premises, and there is no question of homestead in the case.

The plaintiff claims that, upon the facts stated, he has a right to be subrogated to the lien which the St. Joseph Building Company had upon the land prior to Paramore's judgment lien, to the extent of the amount of money furnished by him to pay off that lien, with interest. It is not perceived upon

what principle this contention can be maintained. The loan of twenty-five hundred dollars by plaintiff to Lindsay, the execution of the notes by him to the plaintiff, and of the deed of trust to secure them, the payment of the money to the building company, and its acceptance by the company, may be considered as all parts of one transaction, and it may be conceded that the money paid by the plaintiff through his agent was at the request of Lindsay. Nevertheless, at the time the money was loaned and the payment made the plaintiff had no right or interest in the property, for the protection of which it became necessary that such payment should be made. By that payment he for the first time secured any interest in the land; that the parties had previously been negotiating in regard to the loan, and to the payment of the building company's claim, cuts no figure in the case. The plaintiff thereby acquired no interest in the land, and subjected himself to no obligations in respect thereof. He was a stranger to any interest in the land up to the time he voluntarily made the payment. All the interest he ever acquired in the property he acquired by means of that payment; that was the consideration, and the sole consideration, of the notes executed by Lindsay, and the deed of trust to secure their payment.

There is not a *scintilla* of evidence tending to show that the money paid to the company was for the purchase of their lien, and its release to Lindsay, while in the form of a quitclaim deed, states, in express terms, that it is in satisfaction of the deed of trust, and all the facts negative the idea that it was intended as an assignment. There was no evidence tending to prove any agreement that the lien of the building company was to be kept on foot for the benefit of plaintiff. On the contrary, all the facts negative the idea that such was the intention of any of the parties to the transaction. The facts proven show that the plaintiff is not entitled to the subrogation which he prays for, either as of right or by convention. "The demand of a creditor which is paid with the money of a third person, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished, but the doctrine of subrogation will be applied when the person claiming its benefit has been compelled to pay the debt of a third person in order to protect his own rights or to save his own property": Sheldon on Subrogation, sec. 3. The decisions in this state, as elsewhere, will be found in harmony with the principles here laid down: *Wade*

v. *Beldmeier*, 40 Mo. 486; *Wolff v. Walter*, 56 Id. 295; *Wooldridge v. Scott*, 69 Id. 669; *Price v. Courtney*, 87 Id. 387.

The debt due by Lindsay to the building company, and the lien given to secure it, were absolutely extinguished by the payment. Such was the intention of all parties to the transaction. The plaintiff relied for security for the money he advanced solely upon the deed of trust which he took at the time, and the sole ground upon which a court of equity is asked to intervene in his behalf in this case is the assumption that he would not have parted with his money to make the loan and payments if he had known in January that Paramore's judgment lien had attached to the premises in December. Why didn't he know it? That judgment was spread upon the public records in order that all who might deal with the property might know of its existence. He was not prevented from examining the record, or lulled into security by any representation of Paramore, Lindsay, or anybody else. He didn't know, simply because neither he nor his agent looked that he might see and know. That plaintiff's security was less valuable than he expected it would be when he made the loan was the result of his own negligence, and not of the fault, wrong, or mistake of any other person. Against the consequences of that negligence, for which he has no one to blame but himself, a court of equity cannot relieve him by interfering with the legal rights of others who are without fault. The authorities cited by appellant, and many others, have been examined in vain to find any recognized equitable principle which would warrant the court in so doing. The relief which courts of equity are authorized to administer is to be measured by established and well-recognized principles, and not by the "chancellor's foot." This case has been treated as though the only real defendant in the case, Leisenrig, stood in the shoes of Paramore,—a position, however, which is far from being sustained by the evidence.

The judgment of the circuit court is affirmed.

HOMESTEAD IS NOT GENERALLY SUBJECT to a judgment lien while occupied as such homestead: *Ketchin v. McCarley*, 26 S. C. 1; 4 Am. St. Rep. 674; *Biss v. Clark*, 39 Ill. 590; 89 Am. Dec. 330; *Blue v. Blue*, 38 Ill. 9; 87 Am. Dec. 278; *Cummings v. Long*, 16 Iowa, 41; 85 Am. Dec. 502; *McDonald v. Badger*, 23 Cal. 393; 83 Am. Dec. 123; note to *Filley v. Duncan*, 93 Id. 351; but see *Hoyt v. Howe*, 3 Wis. 752; 62 Am. Dec. 705. When, for any reason, the property ceases to be occupied as a homestead, the lien attaches and may be enforced: *Tillotson v. Millard*, 7 Minn. 513; 82 Am. Dec. 112; *Biss v. Clark*, 39 Ill. 590; 89 Am. Dec. 330; and see the notes to the cases above cited.

HOMESTEAD IS NOT SUBJECT TO SALE under execution: *Sampson v. Williamson*, 6 Tex. 102; 55 Am. Dec. 762; *Achley v. Chamberlain*, 16 Cal. 161; 76 Am. Dec. 516; note to *Blue v. Blue*, 87 Id. 273. But when it covers more land than is allowed by law, the surplus may be sold: *McDonald v. Badger*, 22 Cal. 393; 83 Am. Dec. 123; note to *Blue v. Blue*, 87 Id. 276.

SUREGATION WILL NOT ARISE IN FAVOR of a mere stranger or volunteer, but only in favor of one who, on some sort of compulsion, discharges an obligation against a common debtor: *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783, note 788, 789; *Price v. Courtney*, 87 Mo. 387; 56 Am. Rep. 453; *Neely v. Jones*, 16 W. Va. 625; 37 Am. Rep. 794.

JUDGMENT LIEN IS NOT DIVESTED by subsequent occupation of the land as a homestead: *Freeman on Judgments*, 3d ed., sec. 355, citing *Wiston v. Robinson*, 21 Iowa, 531.

SALE OF HOMESTEAD ON EXECUTION, AND RIGHT TO HAVE HOMESTEAD SET OFF AT SUCH SALE: See note to *Blue v. Blue*, 87 Am. Dec. 273 et seq.

STATE v. HICKAM.

[95 MISSOURI, 322.]

CRIMINAL LAW — ASSAULT, FORCE NECESSARY TO REPEL. — Where party assaulted believes, and has good reason to believe, that great bodily harm is about to be done him, and acts in a moment of seeming impending peril, he need not nicely gauge the *quantum* of force necessary to repel the assault; but in such case, when the plea of self-defense is set up, the question is, whether, under all the circumstances, the accused had reason to believe, and did believe, that the force exercised was necessary to protect him from impending danger of great bodily harm.

CRIMINAL LAW — ASSAULT TO KILL — ERRONEOUS CHARGE. — Where accused is on trial for an assault to kill, and pleads self-defense, a charge which instructs that if defendant made the assault charged with a pistol he must show that he made it under circumstances which justified it, is erroneous, for the reason that it casts the burden of proof on defendant, requires a higher degree of proof than the law demands, and submits a question of law to the jury as to what facts would justify the assault.

ASSAULT TO KILL — PROOF TO ESTABLISH. — In trial of an assault with intent to kill, where the plea of self-defense is interposed, the state must establish, not only by a preponderance of evidence, but beyond a reasonable doubt, that the assault was committed with intent to kill, in malice, and under such circumstances as not to be justifiable as self-defense.

CRIMINAL LAW — ASSAULT TO KILL — ERRONEOUS INSTRUCTION. — In trial for an assault with intent to kill, where the plea of self-defense is set up, it is error to instruct the jury to find a verdict of guilty unless the accused showed some satisfactory grounds for making the assault, as it leaves them to determine what facts would satisfy the law and constitute a good defense, a question which they are not competent to determine.

CRIMINAL LAW — ASSAULT TO KILL — REASONABLE DOUBT. — Where defendant, on trial for assault to kill, pleads self-defense, an instruction that, upon the facts stated, the jury must find defendant guilty unless

they have a reasonable doubt of defendant's guilt, and if so, they must give him the benefit of the doubt, but not telling in what way or to what extent, is erroneous. They must be told that if they entertain such doubt, it is their duty to acquit.

CRIMINAL LAW—ASSAULT TO KILL—DEFENSE OF RELATIVE.—When the accused finds his mother and sister engaged in a difficulty with others, he has a right to interfere in defense of his mother, and whether any act he does afterwards can be justified on the ground of self-defense depends on the motive prompting the act, and the circumstances under which it was done, and not as to whether he voluntarily entered into the difficulty.

CREDIBILITY OF WITNESS.—INSTRUCTION that if the jury believe that any witness has knowingly testified falsely to any material fact they may disregard the whole of his testimony, should not be given as a matter of course in any case; but whether it should be given or not always rests in the sound discretion of the court.

CRIMINAL LAW—ACCESSARIES.—Where, in prosecution for an assault to kill, parties are indicted as accessaries, they cannot be convicted unless there was a common purpose, both in the mind of the principal and themselves, to kill, and the assault was committed in an attempt to accomplish the common purpose, or unless it was made by the principal with the intent to kill, of which such accessaries had knowledge, and committed some act in furtherance of the attempt mentioned.

Draffen and Williams, for the appellants.

B. G. Boone, attorney-general, for the state.

BRACE, J. The defendants were jointly indicted under section 1262, Revised Statutes, 1879, for assaulting and shooting one Harrison Davenport, "on purpose, and with malice aforethought," with the intent him, the said Davenport, to kill,—the defendant Samuel Hickam as principal, and the other defendants as present, aiding, helping, abetting, etc., the said Samuel in the felony and assault as aforesaid. They were all found guilty under section 1262, *supra*, the punishment of Samuel Hickam assessed at five years imprisonment in the penitentiary, and that of the other defendants at fines in different amounts. The defendant Susan is the mother, and defendant Nancy Lamm is the sister, of said Samuel, and defendant Edie Bell was a colored servant of the said Susan. As ground for reversal of the judgment in this case, it is urged that the trial court committed error in giving for the state instructions 4, 5, 8, 9, and 10, which are as follows:—

"4. The court instructs the jury that even though the defendant Samuel Hickam may have had good reason to believe, and did believe, that the witness Harrison Davenport was about to do him some great bodily harm, yet that would not

justify him in using any greater amount of force than was necessary to repel such an attack as said Hickam apprehended was about to be made upon him; and if the jury shall find that the defendant Samuel Hickam did shoot said Davenport, and wound and disable him in such a manner that said Davenport could not make any further attack or resistance, and that the said defendant Samuel Hickam, knowing him to be so wounded and disabled, did continue to assault him, then such assault, made after said Davenport was so wounded and disabled, was not made in necessary self-defense.

"5. If the jury shall believe, from the evidence, that Samuel Hickam made an assault upon the witness Harrison Davenport with a pistol, in the manner and form as charged in the indictment, it devolves upon the defendant to show, to the satisfaction of the jury, some satisfactory ground for making such assault, and unless he has so done, the jury should find him guilty."

"8. The court instructs the jury that he who willfully, that is, intentionally, uses upon another, at some vital part, a deadly weapon, such as a revolver, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death; and knowing this, must be presumed to intend death, which is the probable consequence of such an act; and if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly and from a base heart. If, therefore, you believe, from the evidence, that the defendant, Samuel Hickam, on the twenty-fifth day of July, 1884, in the county of Cooper, and state of Missouri, did shoot Harrison Davenport with a pistol, with the manifest design to use such a pistol upon him, without sufficient reason, cause, or extenuation, then the jury will find said defendant, Samuel Hickam, guilty, and assess his punishment at imprisonment in the penitentiary not exceeding ten years.

"9. The court instructs the jury that the law of self-defense is emphatically a law of necessity, and no person can avail himself of the right of self-defense, where he freely and voluntarily enters into and engages in a difficulty, and if the jury shall believe from the evidence that Samuel Hickam sought a difficulty with the witness Davenport, and that he voluntarily entered into such difficulty, and that he shot the said Davenport on purpose, and of his malice aforethought, then there is no self-defense in this case.

"10. The jury are instructed that if they shall believe

from the evidence, that any witness has knowingly testified falsely to any material fact, then the jury may disregard the whole of the testimony of such witness."

The court refused to give the following instruction in behalf of defendants:—

"The mere fact that Nancy Lamm, Susan Hickam, and Edie Bell engaged or took part in the fight or difficulty in which Davenport was shot is insufficient to convict them; under the indictment in this case, it must further be shown by the evidence, to the satisfaction of the jury beyond a reasonable doubt, that they, with knowledge of the intention of said Samuel Hickam to do said shooting, aided, abetted, counseled, advised, or commanded him to shoot said Davenport, and unless this proof has been made they must find said defendants, Susan Hickam, Nancy Lamm, and Edie Bell, not guilty, although they may have been present, and may have been engaged in the difficulty when the shooting took place."

1. The proposition contained in the first paragraph of the fourth instruction is incorrect. If the defendant Samuel Hickam had good reason to believe, and did believe, that Davenport was about to do him some great bodily harm, and "acted in a moment of apparently impending peril, it was not for him to nicely gauge the proper *quantum* of force necessary to repel the assault": *State v. Palmer*, 88 Mo. 568. On the plea of self-defense, the question to be determined by the jury was, not whether the shooting was actually necessary to repel the attack, or whether some other or lesser force might not have been adequate to the defendant's emergency, but whether when he did shoot, under all the circumstances, he had reasonable cause to believe, and did believe, that such shooting was necessary to protect himself from impending danger of great bodily harm: *Nichols v. Winfrey*, 79 Mo. 544, and cases cited. This incorrect proposition was so connected with the correct one declared in the second paragraph of the instruction as to indicate that the latter was the corollary or equivalent of the former, and as a whole the instruction had a tendency to confuse or mislead the minds of the jurors.

2. The fifth instruction, purporting to cover the whole case, is either obnoxious to a like criticism, or asserts incorrect legal propositions. If the jury, as therein instructed, found, from the evidence, that the defendant made the assault in manner and form as charged in the indictment, then there was and could be no defense in the case. If, however, the court meant

to tell the jury that if they found, from the evidence, that the defendant made an assault upon the witness with a pistol, then it devolved upon him to show that the assault was made under such circumstances as would justify it, it is faulty for three reasons: 1. It devolved upon the defendant the burden of proof; 2. It required a higher degree of proof than the law demands; and 3. It submitted a question of law to the jury, i. e., what facts would justify the assault. The defendant could not be lawfully convicted on the indictment, either under section 1262 or 1263, unless the shooting was done in malice with the intent to kill. If it was done under such circumstances as to be justifiable on the ground of self-defense, it was without malice. The defendant, through the whole of the trial, is clothed with the presumption of innocence of the offense with which he is charged. The state failed to make out its case, if, upon the whole evidence, it failed to prove, not to the satisfaction of the jury, for that might be done by a preponderance of the evidence, but beyond a reasonable doubt, that the shooting was done by the defendant with the intent to kill, in malice, i. e., under such circumstances as not to be justifiable on the ground of self-defense: *Nichols v. Winfrey*, 79 Mo. 544; *State v. Wingo*, 66 Id. 181; 27 Am. Rep. 329; *Chaffee v. United States*, 18 Wall. 517. Malice and an intent to kill being essential elements of the offense with which the defendant was charged, it devolved upon the state to prove them the same as any other fact in the case necessary to establish guilt. From their nature they are not susceptible of proof by direct and positive evidence, but can and may be inferred from other facts. Malice may be inferred from the intentional use of a deadly weapon upon a human being, an intent to kill from its intentional use on or at a vital part, and the jury may well be told that these inferences may be made. They are deductions of fact, however, to be made by the jury in the light of all the facts and circumstances in evidence in the case; they are not conclusions to be reached at any stage of the case, if the attendant facts and circumstances militate against such conclusions to an extent sufficient to raise in the minds of the jurors a reasonable doubt of their correctness and of defendant's guilt. The satisfactory grounds that would constitute a defense to the assault charged are such grounds as would satisfy the law, and not the jury. By the instruction the jury were told to find the defendant guilty unless he showed some satisfactory grounds for making the assault, leaving to them to determine

what facts would satisfy the law and constitute a good defense, —a question of law that they were not competent to determine, and which should not have been submitted to them: *State v. Forsythe*, 89 Mo. 667.

3. The eighth instruction also purports to cover the whole case, and while in the first paragraph some correct principles are laid down in the abstract, yet, when application of them is attempted to the case in hand, in the second paragraph so much is left out that practically the instruction is but a repetition in a slightly changed form of the fifth, and what is said in regard to that instruction is equally applicable to this. It must be conceded that these instructions standing alone are erroneous in the particulars pointed out. If, as in the case of *State v. Alexander*, 66 Mo. 158, the direction to find the defendant guilty upon the facts hypothecated had been qualified by the words "unless justification appears from the evidence offered by the state," and an instruction had been given directing the jury to acquit, if, upon the whole case, they had a reasonable doubt of defendant's guilt, it might be contended that the two first vices mentioned were cured. But no such qualification was contained in either instruction, and the jury were simply instructed that if they had a reasonable doubt of defendant's guilt, they should give him the benefit of the doubt, but in what way and to what extent they were not told. They might have supposed that the requirement of the instruction was satisfied if they applied the principle in the determination of the *prima facie* case the state was required to make out; and being satisfied beyond a reasonable doubt that the defendant did assault and shoot the witness with a pistol, they may have found the defendant guilty because he did not make out some undefined defense satisfactorily to them, and thus reconciled the instructions; or, on the whole case, they may have had a reasonable doubt of defendant's guilt, and felt that they were giving him the benefit of the doubt by assessing a milder punishment than they otherwise would have assessed, so that these instructions, whether read alone or in connection with the one on reasonable doubt, are erroneous, and were calculated to mislead the jury.

4. If the defendant Sam Hickam, on purpose, and of his malice aforethought, shot Davenport, then there is no self-defense in the case, is the legal truism declared in the last sentence of the ninth instruction; and this would be true just the same whether he sought the difficulty, or voluntarily en-

tered into it or not. What was said on that subject was entirely superfluous to the conclusion drawn, was unnecessary, not applicable to the case, and its only tendency was to confuse the minds of the jury. The uncontroverted evidence was, that when Sam Hickam appeared upon the scene in front of his father's house, the difficulty was on between the prosecuting witness, Davenport, and his nephew, on one side, and Hickam's mother and sister on the other; whoever brought it on, he did not. In that difficulty he had a right to interfere in behalf of his mother; whether any act he did afterwards could be justified on the ground of necessary defense of himself or of his mother, would depend on the motive prompting the act and the circumstances under which it was done, and not upon the fact that he voluntarily entered into the difficulty.

5. Instruction number 10 should not be given as a matter of course in any case, but when it should be given, and when not, is a question difficult to determine upon a record, and the propriety of giving it in any particular case must be left largely to the judgment and discretion of the trial court: *White v. Masey*, 64 Mo. 552. We cannot see that this was a case in which it was not proper to give it.

6. We cannot say that the court erred in refusing defendant's instruction in the form asked; the mere fact that Nancy Lamm, Susan Hickam, and Edie Bell took part in the fight or difficulty of course was not sufficient to convict them, but they might have been convicted under the indictment, although they had no knowledge that Samuel Hickam intended to shoot Davenport, and although they neither aided, advised, nor commanded him to shoot Davenport. Neither of these defendants, however, could properly be convicted of the offense charged in the indictment, unless the jury found, either that there was a common purpose in the minds of Sam Hickam and such defendant to kill Davenport, and the shooting was done in the attempted accomplishment of such common purpose, or that such shooting was done by Sam Hickam in the attempted accomplishment of a purpose in his mind to kill Davenport, of which such defendant had knowledge, and that she did some act in furtherance of the attempted accomplishment of such purpose; and a proper instruction on this branch of the case ought to have been given.

The judgment is reversed, and the cause remanded for new trial.

SELF-DEFENSE, WHAT FACTS WILL SUSTAIN PLEA OF: See *Brown v. State*, 83 Ala. 33; 3 Am. St. Rep. 685, and cases in note. In *Duncan v. State*, 49 Ark. 543, and *State v. Rose*, 92 Mo. 201, it is held that the person assaulted is not authorized to slay his assailant until he has exhausted every means consistent with his safety to avoid and avert the necessity of so doing.

BURDEN OF PROVING PRESENT NECESSITY OF USING FORCE IN SELF-DEFENSE is on the defendant, but when he has shown this, the prosecution may avoid the effect by showing that defendant was at fault, or could have avoided the assault: *Brown v. State*, 83 Ala. 33; 3 Am. St. Rep. 685, and note.

PROSECUTION IS BOUND TO PROVE EVERY NECESSARY ELEMENT OF CRIME BEYOND REASONABLE DOUBT: *Commonwealth v. McKie*, 1 Gray, 61; 61 Am. Dec. 410; *Billard v. State*, 30 Tex. 367; 94 Am. Dec. 317; and if they fail to do so, it is the duty of the jury to acquit: *Mitchell v. State*, 22 Ga. 211; 68 Am. Dec. 493. A reasonable doubt is not every captious doubt, such as may lead the juror to a consciousness that his conclusion may be wrong, but is a state of mind which deprives the juror of ability to reach a conclusion that is satisfactory to him: *State v. Roberts*, 15 Or. 187. Where the court, after correctly instructing the jury on the subject of reasonable doubt, said, "But mere probabilities of innocence, or doubts, however reasonable, which beset some minds on all occasions should not prevent a verdict" of guilty. This instruction was held not misleading, although ambiguous: *People v. Les Sars Bo*, 72 Cal. 623.

ACTUAL INTENT TO KILL AT TIME OF ASSAULT MUST BE PROVED, and found to authorize a conviction of assault with intent to kill: *Maher v. People*, 10 Mich. 212; 81 Am. Dec. 781; but see, as to intent or *gravamen* of offense, *State v. Williams*, 95 Mo. 247; *ante*, p. 46, and note. In *Scott v. State*, 49 Ark. 156, it was held that proof of particular intent to kill deceased was not necessary to make out the crime, if the defendant, with intent to kill any one in it, fired at a crowd of persons, of whom the deceased was one.

PRINCIPLE OF SELF-DEFENSE APPLIES WHERE ONE RESISTS BY FORCE assault upon his relatives: See *Dukes v. State*, 11 Ind. 557; 71 Am. Dec. 371.

ONE WHO COMBINES WITH OTHERS IN A COMMON OBJECT AND DESIGN is legally and criminally responsible for all of the consequences which flow from the execution of such design: *Commonwealth v. Campbell*, 7 Allen, 541; 83 Am. Dec. 705; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320, and note.

RULES CONCERNING INSTRUCTIONS UPON MAXIM, FALSUS IN UNO, FALSUS IN OMNIBUS: See the note to *Dunn v. People*, 86 Am. Dec. 330, 331.

TURNER v. JOHNSON.

[96 MISSOURI, 481.]

STATUTE OF FRAUDS — MORTGAGE SALE — LACHES. — Parol agreement that the second mortgagee is to buy at the sale under the first mortgage, and allow the mortgagor a reasonable time to redeem by paying the amount bid, the second mortgage debt, and other adjusted accounts, is not within the statute of frauds, nor is the mortgagor guilty of laches if he begins his action to redeem within three years and a quarter after the sale.

MORTGAGEE IN POSSESSION IS HELD to the exercise of that care and diligence which a prudent man would exercise in respect to his own property.

MORTGAGEE IN POSSESSION IS NOT LIABLE for more than the rents actually received, unless he is guilty of fraud or negligence.

MORTGAGEE IN POSSESSION WHO ATTENDS to the business through agents is not allowed compensation for his own trouble, but reasonable expenses paid an agent to superintend work, lease the land, and collect rents are proper matters of credit.

JUDGMENT OF ANOTHER STATE AGAINST PRINCIPAL AND SURETY, properly assigned to the surety, bears interest in his favor as called for by such judgment.

MEASURE OF DAMAGES. — **MORTGAGEE IN POSSESSION** who sells the premises is liable only for the value of the land at the date of sale, in the absence of circumstances calling for the exercise of any rigor.

OBJECTIONS NOT MADE ON MOTION FOR NEW TRIAL are not noticed on appeal.

SECOND MORTGAGEE WHO PURCHASES PREMISES to protect himself, at the request of the mortgagor, who, it is agreed, may redeem, is subrogated to the rights of the first mortgagee, and entitled to the interest specified in the first mortgage.

COSTS. — **WHEN PLAINTIFF IS PREVAILING PARTY** in a suit in equity, he should recover costs, but this is in the discretion of the trial court, and will not be disturbed, unless there has been an abuse of the discretion.

COSTS. — **WHERE SUBSTANTIAL ISSUES** are found for both parties, the taxation of costs rests in the discretion of the courts, and will not be disturbed, unless there has been a clear abuse of discretion.

PLAINTIFF, AND NOT DEFENDANT, MUST PAY COSTS in a suit to redeem from a mortgagee's possession, and this though he succeeds, unless defendant is guilty of fraud in his defense.

B. R. Vineyard, H. L. Stone, and Thomas F. Hargis, for the appellant.

Ramey and Brown, Woodson, Green, and Burnes, D. H. McIntyre, and C. C. Turner, for the respondent.

BLACK, J. The plaintiff, Thomas Turner, on the 25th of July, 1875, executed a deed of trust on 2,815 acres of land in De Kalb County, this state, to secure the payment of his note of that date for fifteen thousand dollars, due in five years, with semi-annual interest, payable to the Life Association of

America. The defendant, Johnson, as the surety of Turner, paid a debt to the Northern Bank of Kentucky. He was also bound in a like capacity for the payment of another debt of Turner to the Farmers' National Bank of Mount Sterling, Kentucky. Both of these debts had been reduced to judgment against Turner and Johnson. The latter had paid another debt for A. G. Peters, for which Turner was bound as a co-surety, but had paid no part of his share, and hence was bound to make contributions to Johnson. To secure these several debts, amounting to seven or eight thousand dollars, Turner made a mortgage to Johnson on the Missouri lands previously mortgaged to the life association. The mortgage to Johnson bears date the 16th of September, 1876. Certain lands in Iowa were included in this deed of trust and in the mortgage. The Missouri lands were sold under the deed of trust on the 23d of April, 1879, and Johnson became the purchaser at the sum of eleven thousand dollars.

On the 20th of July, 1882, plaintiff commenced this suit in the De Kalb circuit court to redeem from the mortgage and sale under the deed of trust. Relief is asked mainly on the ground that Johnson purchased the property at the trustee's sale under an agreement with plaintiff that he should have the right to redeem within a reasonable time by paying the amount bid, and all other indebtedness of Turner to Johnson. There were unsettled accounts between the parties besides those mentioned in the mortgage. The venue of the cause was changed to the Livingston circuit court. That court made a decree allowing the plaintiff to redeem, and sent the cause to a referee to hear the evidence, and state the accounts between the parties. The report of the referee, as modified by the court, shows an indebtedness of Turner to Johnson of about eighteen thousand dollars. Both parties have appealed to this court; and the first question on the defendant's appeal is as to the right of the plaintiff to redeem the land.

The record is voluminous beyond precedent, but the following statement of the evidence will present the question now to be determined: Turner and Johnson resided at Mount Sterling, in the state of Kentucky, and for many years had been on friendly terms. Turner, as an attorney at law, had represented Johnson in many matters. Turner had paid some three or four thousand dollars on the principal of the debt to the life association located at St. Louis; but in the latter part of the year 1878, having made default in the payment of the

interest, the association threatened to sell the land under the powers contained in the deed of trust. He felt his inability to pay that debt at its maturity in 1880. He applied to various persons, and among others to Johnson, for assistance. He testifies to several conversations in November and December, 1878, and in which he says Johnson agreed either to buy the debt of the life association, or bid in the land at the trustee's sale, and hold it as security for the amount bid, and for the mortgage and other debts owing to Johnson. That conversations were had on this subject at that time is conceded; but Johnson states emphatically that he made no such agreement. Turner was then a member of Congress from Kentucky, and left for Washington the last of December, 1878. About this time Johnson went to Georgia, but left the matter with his attorney, Judge Peters, who entered into correspondence with the life association. A letter from Peters to the association, dated in January, 1879, stated the fact that Johnson held a second mortgage, and made inquiry if they would allow Johnson to arrange the matter by paying one half of the debt down and the other half in twelve months. Further correspondence led to a postponement of the proposed sale until the 23d of April, 1879, in order to give Johnson an opportunity to come to this state and examine the land. During this correspondence, Turner wrote the association that Johnson would buy in the land, and allow him to redeem. It does not appear that Johnson ever saw this letter.

On the 25th of January, 1879, Johnson directed Peters to go ahead and fix a time for a conference with the association; and after speaking of the necessity of making some money arrangements, evidently in respect to this matter, he says in that letter: "I am glad the parties to the mortgage refused to make any arrangement and give time to Turner. I prefer it should be made to suit me. In our conference, if I am satisfied the land has value enough to pay me after paying off the mortgage, I will prefer they go and sell *bona fide*, and I attend the sale and bid the amount of the debt, take legal title in that sale. If Turner pays me in a reasonable time the whole amount I paid for land and as his security, let him do so and redeem it. I think this the better plan. What do you think of it?" After this, and on the 12th of February, Johnson, in a letter to Turner, says he had been in communication with the association; that the debt amounted to \$12,582, and he goes on to say: "I will, however, if able when

I return home and it is not too late for the sale, go and see it [the land]. It is too big a thing to go into blind." To this Turner replied by urging Johnson to have the sale postponed, saying: "I fear this is the only means by which I can make you whole."

Johnson reached St. Louis on or before the 16th of April, and on that day he telegraphed Turner: "Please instruct by telegraph, at my expense, Henry W. Hough, trustee, to sell the De Kalb County lands in one parcel, without subdivision. This will be for your interest and mine, and the life association consents." To this Turner answered by telegram: "Sell De-Kalb land in a body without subdivision." Johnson says he did not send this telegram, but only gave his consent to the association to say to Turner that he, as second mortgagee, was willing for the land to be sold in a body; but the evidence is quite clear that he not only knew how the telegram was worded, but that it was sent in his name and with his approval, and that he saw the answer.

Johnson then went to De Kalb County, saw the land, and then telegraphed Turner that he could not buy the land until Dawson, a tenant in possession, was directed to turn over possession. Turner at once complied with the request by giving Dawson suitable directions to that end. On the same day, the 21st of April, Johnson wrote Turner that he had not yet agreed to buy. This statement clearly means that he had not yet come to an agreement with the association; but he did, before the day of sale, indicate to the association that he would bid eleven thousand dollars and no more, and it is equally clear that the association had agreed to let the land go at that price. In this letter of the 21st of April, Johnson, among other things, says: "I got your answer as I was leaving home for this state. Certainly I would let you redeem the lands if I buy, in any reasonable time, say twelve months, and would no doubt be glad to do it by your paying what I pay, and also paying me all you owe me, cost and expenses, etc., which I understand as your request, and I repeat, I would gladly do it. All I want is my money back, and ten per cent interest. I can't bind myself in law to do this any day to come, as that would cut me out of the right of making sale, and I don't want to hold any lands in this state. I will be liberal with you, and hope you will soon make a rise, and come prepared to buy back the land if I should buy it, and I confess I am at a great loss what to do. If I buy with my

claims it will cost me twenty-two or twenty-three thousand dollars, or more. I telegraph you to-day from here. Will post you after the sale." This letter was not and could not have been received by Turner until after the 23d of that month, the day of sale.

There is much conflict in the evidence as to what transpired on the day of sale. We are satisfied, however, there was no offer to sell the land in parcels. It is also clear that a number of persons desired to bid on parcels, and would have paid a much higher price than that bid therefor, per acre, by Johnson, had it been sold in subdivisions. There is evidence to the effect that Johnson gave out word that he bid in the interest of Turner. Johnson says he made no such statement, but says he made a public statement at the sale that he bid for himself alone, and that he would bid no more than eleven thousand dollars, and in this he is corroborated by several witnesses who were at the sale.

1. The evidence in this case leads to the conclusion that Johnson had no confidence in Turner's ability to pay the debts, and his former experience furnished a sufficient basis upon which to rest that conviction. He evidently designed to buy in the land mainly for his own protection, and to do it in such a way as to be under no legal obligations to Turner on account of the purchase, leaving any favors which he might extend to Turner as a matter of grace. But we are satisfied a different effect must be given to these transactions, and for these reasons: Turner expected Johnson to either take up the note held by the life association, or buy in the lands and hold them as a security for the amount bid, and for other debts due Johnson. Johnson's correspondence with the life association shows that he first contemplated a purchase of the note, then of the land. He had not determined which, if either, he would do before he came to St. Louis, but he had expressed a willingness to Judge Peters to allow Turner a reasonable time to redeem, in the event he bought the land. This was what Turner desired, and that desire must have been known to Johnson, for it had been the object of Turner's solicitations from first to last. No terms of redemption had been spoken of in the letters, save that of a reasonable time, and we are satisfied these were the only terms spoken of in the conversations. Now, when Johnson came to St. Louis and asked Turner to allow the lands to be sold in a body, and, before the sale, said he could not buy unless the tenant was directed to turn over

possession, Turner had a right to conclude, and indeed, could come to no other conclusion than this, that Johnson intended to buy the land and allow him the right to redeem, and that, too, within a reasonable time. If Johnson intended any other arrangement, he could have indicated it to Turner by telegram, and under the circumstances it devolved upon him to do so. He must stand on the state of facts known to both parties, and the understanding so clearly to be deduced from them. His uncommunicated intentions can be of no avail. The sale of the land in a lump excluded the other persons desiring to bid from the list of competitors, and for all practical purposes left the matter to defendant's proposed bid of eleven thousand dollars.

The sale of such a body of lands, constituting at least three farms, in a lump, would of itself be sufficient reason for setting aside the sale on a timely application, but for Turner's consent to a sale in that way. This consent and the possession, having been obtained upon the understanding on the part of Turner before indicated, it would be a gross injustice to measure his rights by any other agreement. The agreement, then, is that of a second mortgagee to buy at the sale under the first mortgage, and allow the mortgagor a reasonable time to redeem by paying the amount bid, the second mortgage debt, and other adjusted accounts. The fact that this agreement rests in parol is of no avail to the defendant. The statute of frauds cannot be invoked by one who purchases with such an agreement, and this for the further reason that the statute was never designed to aid a party in the perpetration of a fraud, but was intended to prevent frauds: *Rose v. Bates*, 12 Mo. 80; *Damschroeder v. Thias*, 51 Id. 100; *Gillespie v. Stone*, 70 Id. 506; *O'Fallon v. Clopton*, 89 Id. 287; *McNew v. Booth*, 42 Id. 190. This view of the case renders it unnecessary to say more of the letter of the 21st of April. Nor need we consider the conflicting evidence in respect of two other letters from defendant to plaintiff, one written from Missouri, after and on the day of sale, which plaintiff says he did not receive, and the other in a month or so thereafter, said by plaintiff to have been lost, and which defendant says he did not write. Whether the defendant wrote these two letters, or either of them, is not important. We let the judgment stand on what we conceive to be reliable evidence of matters as they stood when the sale took place. Our conclusion is, that defendant is substantially

a mortgagee in possession, and there was no error in allowing the plaintiff to redeem.

2. Ineffectual efforts were made in November, 1879, and in the year 1880, to come to a settlement of the unadjusted accounts existing between the parties, each accusing the other of being in fault and the cause of the failure to settle. These accounts were complicated, as shown by the mass of evidence taken in respect of them. The improvements placed on the land by Johnson were of such a character only as good husbandry called for, and for which expenditures he has been compensated. This suit was commenced within three years and three or four months after the date of the trustee's sale; and we cannot see that the question of laches made by defendant has any proper application to the case. On the accounting branch of the case, defendant filed seven exceptions to the report of the referee, three of which were sustained. Plaintiff filed thirty, one being sustained in part. The other exceptions were overruled. To many of these rulings errors are assigned by one side or the other; and what is hereafter said will be in response to the questions thus raised.

3. A mortgagee in possession is held to an exercise of that care and diligence which a prudent person would exercise in respect of his own property. He will not be held accountable for more than the rents actually received, unless he has been guilty of fraud or negligence: *Ely v. Turpin*, 75 Mo. 286; 2 Jones on Mortgages, sec. 1123. He is not entitled to compensation for his own trouble in taking care of the mortgaged property, the reason of this rule being, that to allow such compensation would tend to facilitate usury and oppression, and besides this, the mortgagee acts in his own interest and for his own benefit: 2 Jones on Mortgages, sec. 1132. There is a tendency toward a modification of this rule as to trustees and possibly even mortgagees in possession; but where as here the mortgagee attends to the business through agents, we think he should not be allowed compensation for his own trouble. Here was a large body of land, three farms, and the defendant built a number of miles of fence. Reasonable expenses paid to an agent to superintend the work, lease the land, and collect rents are proper matters of credit. A prudent owner acting for himself might well incur like expenses. The evidence of the value of the rent is conflicting; some of the estimates have all the appearances of being extravagantly high, but the evidence as a whole shows that defendant managed the property with full

ordinary care. His management of the lands, it is safe to say, has been superior to that of the plaintiff before the sale, and there can be no pretense for a charge of fraud or negligence in the management of the property. He stands charged with the rents received, and in other respects the rulings of the court were in accord with the principles before stated.

4. One of the debts due from Turner to Johnson is described in the mortgage dated the 16th of September, 1876, as a judgment in favor of the Farmers' National Bank against Turner and Johnson, "and Johnson has agreed to pay it, and take a transfer of the judgment." This judgment bore ten per cent interest per annum. Johnson was the surety of Turner. The referee allowed six per cent interest on \$2,966.65, the amount paid by Johnson on December 20, 1876. The court modified the allowance so as to bear ten per cent interest. By the statute laws of Kentucky, a surety who pays a judgment against the principal and himself has the right to an assignment thereof from the plaintiff or his attorney, and may sue out execution thereon. That Johnson would be entitled to ten per cent is not denied, if the judgment was properly assigned. It was not assigned until December, 1882, or January, 1883. This statute (Stanton's R. S., c. 97, p. 396) was construed by the court of appeals of Kentucky in *Veach v Wickersham*, 11 Bush, 261, and in *Joyce v. Joyce*, 1 Id. 474; and we do not understand the ruling to be that the assignment must be made at the time the debt is paid by the surety. Without such assignment, or an express contract, the surety would stand on his implied contract for reimbursement; but we are of the opinion the assignment may be procured at any time before that implied contract ceases to be a subsisting demand. No claim was made that it was not a subsisting debt at the date of the assignment. Besides this, the mortgage provides for an assignment, doubtless with the view of giving Johnson all the benefits of the judgment creditor in respect of the debt. The debt, it is true, was paid directly to the bank, and the assignment was made in the name of the bank by Mr. Reid, who signed the firm name of Apperson and Reid, the attorneys who procured the judgment. Apperson died before the date of the assignment; but Mr. Reid had the power to make the assignment, notwithstanding the death of his partner. The fact that Johnson paid the debt directly to the bank, and not to the attorneys, is immaterial. He paid the debt; the law gave him the right to an assignment from

the bank or its attorney, and it is wholly immaterial by which it was made. It was, after all, the act of the bank, done in compliance with the plain command of statute law. There was, therefore, no error in allowing ten per cent interest on this demand.

5. The defendant stands charged with the price at which he sold two forty-acre tracts in 1880 and 1881. The evidence is satisfactory to the effect that the price at which they were sold was the then full value. It has been held, where the mortgagee disposes of the premises, and the circumstances do not call for the exercise of any rigor, the measure of the damage will be the value of the land at the date of sale: *Wilson v. Drumrite*, 24 Mo. 304. This was all the plaintiff claimed in his amended petition, but by the second amended petition he asked for the value of the land at the date of the trial. Our attention is called to the fact that this portion of the second amended petition was stricken out, and that an exception to the ruling is not preserved by the bill of exceptions. The demand for increased damages is, therefore, not properly before us.

6. We may here say the defendant in his briefs complains that he was not allowed ten per cent interest on the \$11,000, and that the court reduced the principal of the little debt from \$5,908.70, as stated by the referee, to \$5,519; but as the defendant's motion for new trial makes no complaint of these rulings they are not considered here.

7. Another question is, What rate of interest should be allowed defendant on the amount he bid at the trustee's sale? The debt secured by the deed of trust bore eight and two thirds per cent before and ten per cent after maturity. The sale was made before the maturity of the principal debt. One who purchases or holds under a purchaser at an invalid sale under a mortgage given to secure school moneys will be subrogated to the rights of the mortgagee, the purchase-money having been paid to the credit of the school fund: *Honaker v. Shough*, 55 Mo. 472; *Wilcoxon v. Osborn*, 77 Id. 632. So where one purchases at a void administrator's sale, and the money is applied in discharge of a mortgage on the same land, he will be substituted to the rights of the mortgagee: *Valle v. Fleming*, 29 Id. 152; 77 Am. Dec. 557. Johnson, by his purchase, acquired the legal title, but subject to the right of plaintiff to redeem; and there can be no doubt that, for all purposes of redemption, he stands in the shoes of the life association to the extent of

the amount bid, namely, eleven thousand dollars. His right to hold the property until the payment of the amount bid, and his liability to account for rents, carry the right to have the full benefit of the deed of trust, including interest on the debt at the rate therein specified: *Harper v. Ely*, 70 Ill. 581. Defendant is in no sense a volunteer. He purchased to protect himself, as second mortgagee, and at the request of the plaintiff. He is entitled to the full benefit of the deed of trust, and that gives him at least eight and two thirds per cent. Defendant contends for ten per cent. But, for the reasons before stated, this complaint is not presented by the record.

8. Numerous other objections are made to the report of the referee by the plaintiff, and especially as to the amount allowed for services rendered defendant as an attorney, and as to the amount with which the defendant is charged as revenues earned by the stallion Magic, the joint property of these litigants. The referee heard the mass of evidence, and stated the accounts with great care, and we are satisfied with his conclusions. As to the other matters of complaint, so far as we can see from the imperfect abstracts on this branch of the case, the referee's report, as modified and confirmed by the court, is without error, both as to the finding of the facts and the statement of the account.

9. Finally, as to costs: These were, by the final decree, ordered to be taxed to plaintiff, except as otherwise adjudged during the progress of the cause. The statute provides: "In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law." Other sections provide that costs shall be given at the discretion of the court, first, where the defendant shall plead several matters, and a verdict shall be for plaintiff on any issue; second, where there are several counts in the petition, and the verdict on any one shall be for the defendant. These statutes are the same now as in the Revised Statutes of 1845, save the present statute speaks of a "petition," and the former of a "declaration": R. S. 1845, p. 242, secs. 6, 8, 9; R. S. 1879, secs. 990, 992, 993. These provisions in the code of 1845 have reference to actions at law alone, for the eighteenth section provides: "Upon the complainant dismissing his bill in equity, or defendant dismissing the same for want of prosecution, the defendant shall recover against the complainant his costs; and in all other cases in equity, it shall be in the discretion

of the court to award costs or not, except in those cases in which a different provision is made by law." Under this statute, it was the uniform ruling of this court, in equity suits, not to interfere in the taxation of costs by the trial court unless there had been an abuse of the discretion: *Shields v. Hickerson*, 7 Mo. 134; *Walton v. Walton*, 19 Id. 668; *Walker v. Likens*, 24 Id. 304. In the revision of 1855, this section is modified by substituting "plaintiff" for "complainant," and "plaintiff dismisses his suit" for "complainant dismisses his bill in equity." The section still remains, as thus modified: R. S. 1879, sec. 1002. The chief purpose of the change in the phraseology of these sections was to conform them to the nomenclature of the new code, in which the party complaining is called plaintiff, and the first pleading a petition, both in actions at law and in equity.

As a general rule, where the plaintiff is the prevailing party in a suit in equity, he should recover costs. It was so held in *Hawkins v. Nowland*, 53 Mo. 328, but without any consideration of the history of these statutes. Where, however, substantial issues are found for one party, and like issues found for the other, the taxation of costs will rest in the discretion of the court, and will not be disturbed unless there has been a clear abuse of that discretion. This discretion is vested in the court when the verdict is for one party on one count or defense, and for the other party on another count or defense, and there is no reason why the principle should not be applied in equity suits, though there be but one count, there being distinct issues. Some support is given to this conclusion by what was said in *Dupont v. McLaran*, 61 Mo. 511. In this case, there were many distinct issues, that as to the right to redeem being found for the plaintiff, and those as to the amount of money to be paid for the defendant. We may, therefore, settle the question upon equitable principles.

The general rule is, that the plaintiff, and not the defendant, must pay the costs in a suit to redeem from a mortgagee's possession, and this though he succeeds. There are exceptions to the rule, however, as where the mortgagee sets up an unwarranted or unconscientious defense, and thereby makes costs and delay: *Slee v. Manhattan Co.*, 1 Paige, 81; *Brockway v. Wells*, 1 Id. 618; 2 Jones on Mortgages, sec. 1111. In the case last cited, it is said: "The defendant Brockway does not appear to have acted fraudulently or in bad faith in selling the contract. He only mistook his legal and equitable rights, and

that forms no ground for charging a mortgagee with costs on a bill to redeem."

In the case of *Harper v. Ely*, 70 Ill. 582, a sale under a trust deed was held void on the ground that Haddock virtually purchased at his own sale, and for this reason the sale was deemed fraudulent. Ely purchased from him with notice. The bill was one to redeem, and it was held that the costs were properly adjudged against the complainant. In *Phillips v. Holsizer*, 20 N. J. Eq. 308, the question was, whether, under the circumstances, the transaction was a mortgage or a contract to reconvey. The defendant refused to accept the money when tendered, and resisted the suit on the ground that the transaction was not a mortgage, and failed in his defense; yet he was allowed costs of the suit. The plaintiff made default in payment of the debt secured by the deed of trust, and has been in default for years as to the mortgage debts. He has shown no haste in paying these debts, and made no tender to defendant. Defendant purchased and went into possession at the urgent solicitation of plaintiff. He has been mistaken, but honestly mistaken, as to the character and legal effect of that purchase, and the repeated charges of fraud on his part are without any support in the reliable evidence in the case. The decree is practically a foreclosure in favor of defendant for over eighteen thousand dollars. Heavy as the costs must be, they are properly taxed to plaintiff; certainly no abuse of the discretion of the trial court is shown.

The judgment is in all respects affirmed, except as hereafter stated. Each party will, of course, pay the costs of his appeal to and in this court. In view of these appeals, the plaintiff will have six months from this date in which to make the deposit of money specified in the original decree. And to this extent the decree is modified.

DUTIES AND LIABILITIES OF MORTGAGEE IN POSSESSION: See the note to *Caldwell v. Hall*, 4 Am. St. Rep. 69-71, discussing the points raised in the principal case.

OBJECTIONS NOT RAISED IN LOWER COURT ARE NOT AVAILABLE ON APPEAL: *Viele v. Germania Ins. Co.*, 28 Iowa, 9; 96 Am. Dec. 83, and note.

RIGHT TO COSTS, GENERALLY: See note to *Ela v. Knox*, 88 Am. Dec. 180-185; *Blue v. Blue*, 38 Ill. 9; 87 Am. Dec. 267.

PURCHASER AT FORECLOSURE SALE IS SUBROGATED TO RIGHTS OF MORTGAGEE, and is entitled to interest until redemption: *Anson v. Anson*, 20 Iowa, 55; 89 Am. Dec. 514.

AGREEMENT BY PURCHASER AT EXECUTION OR JUDICIAL SALE to hold the property for the benefit of the defendant, or to permit him to redeem, not

withstanding his right to redeem has otherwise lapsed, will be enforced in equity: *Freeman on Executions*, sec. 337; *Denton v. McKenzie*, 1 Desau. 289; 1 Am. Dec. 664; *Miller v. Antle*, 2 Bush, 407; 92 Am. Dec. 495; *Beegle v. Wentz*, 55 Pa. St. 369; 93 Am. Dec. 762.

OBJECTION NOT MADE IN THE LOWER COURT will not be noticed on appeal: *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83, note 111; *Hendrickson v. St. Louis R. R. Co.*, 34 Mo. 188; 84 Am. Dec. 76, and notes; *Gates v. Andrews*, 37 N. Y. 657; 97 Am. Dec. 764.

ADAMS v. COWLES.

[96 MISSOURI, 501.]

PROCESS—NOTICE BY PUBLICATION. — Action to cancel a deed as fraudulent is a suit for the establishment of a right to or against real estate, so as to allow notice to non-resident defendants by publication of summons, provided by section 3494, Revised Statutes of Missouri.

PROCESS—NOTICE BY PUBLICATION. — In action to cancel a deed as fraudulent, and to obtain title to the land, notice to non-resident defendants by publication of summons is sufficient under the statute, if it describes the land, and states the object of the suit, especially when collaterally attacked.

MISSOURI CIRCUIT COURT IS ONE OF GENERAL JURISDICTION, proceeding according to the course of the common law, and nothing will be intended to be out of its jurisdiction but what specially appears to be so.

QUESTION OF JURISDICTION MUST BE TRIED by the whole record in Missouri, and when it appears therefrom that the court had no jurisdiction over the person or subject-matter, the judgment is void, and will be so treated in a collateral proceeding.

NOTICE BY PUBLICATION. — **JUDGMENT RECITAL** as to the terms of an order of publication on non-resident defendants, if contradicted by the order itself, must yield, and the order must control.

WHERE JUDGMENT OF COURT OF GENERAL JURISDICTION REQUIRES due service of notice on non-resident defendants, and there is nothing in the order of publication or the record which specifically contradicts such recital, it will be presumed, upon collateral attack, that the court has acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared; and if the statute required an affidavit of non-residence to be filed prior to the order of publication, it will be presumed, in the absence of proof to the contrary, that such affidavit was filed.

FORMAL REQUISITES FOR VALIDITY OF OFFICIAL ACTS ARE PRESUMED when such acts are shown to have been done in a manner substantially regular.

Adams and Bowles, for the appellant.

A. Comingo, for the respondent.

BLACK, J. This was an action of ejectment for the undivided one half of 320 acres of land in Bates County. Both parties claim title through William A. Glenn, who conveyed

the land to William C. Glenn in June, 1869, and he conveyed to Hartwell in 1881, from whom defendant claims by sundry deeds. Judgments were recovered against William A. Glenn in August, 1869, under which the property was sold to Dwight Ferris. The deeds from the sheriff to him are dated March 10 and 11, 1870. Ferris conveyed to Dunstan Adams in 1875, and Dunstan Adams conveyed to plaintiff. Before Ferris conveyed to Adams, he procured a decree in a suit against William A. and William C. Glenn, setting aside the deed from William A. to William C. Glenn, on the ground that it was made to hinder, delay, and defraud the creditors of William A. Glenn. The validity of that decree is the only real controversy in this case. The defendant claims that the decree is a nullity for want of jurisdiction over the defendants, and so the trial court held.

The petition in the case of Ferris against Glenn and Glenn was filed in the circuit court of Bates County on the 12th of October, 1870. A summons was issued for the defendants at the same time, but there is no return on it whatever. At the same time the clerk made an order of publication, the material portions of which are as follows: "Now, at this day comes Dwight Ferris, plaintiff in the above-entitled cause, before the undersigned, clerk of the circuit court of Bates County, in vacation, and files his petition, stating, among other things, that the above-named defendants, William A. Glenn and William C. Glenn, are non-residents of the state of Missouri. It is therefore ordered by the clerk aforesaid, in vacation, that publication be made, notifying them that an action has been commenced against them by petition and affidavit in the circuit court of Bates County, and state of Missouri, the object and general nature of which is to obtain a decree of title to the following described real estate, to wit." The property is then described, and defendants are notified to appear at the March term, 1871. At that term, the plaintiff made proof of publication, and at the September term, 1871, the plaintiff took a decree by default. The record in that case was put in evidence in this one, but no affidavit of non-residence of the defendants appears among the files.

1. The statute (R. S., sec. 3494), allows the service of notice by publication "in all actions, at law or in equity, which have for their immediate object the enforcement or establishment of any lawful, right, etc., to or against real estate." If the deed to William C. Glenn was fraudulent, then it was

void as to Ferris, and that fact could be shown in ejectment. But Ferris had the further right to have the fraudulent deed canceled, and in effect erased from the public records, and to do this whilst the evidence was at hand. The relief asked is the establishment of a right to real property, and comes within the statute allowing the service of notice by publication.

2. Nor is the notice published bad for a failure to state "briefly the object and general nature of the petition." These are the words of the statute, which requires the land to be described only in partition suits. Here the land is described, and the defendants are notified that the object of the suit is to obtain a decree of title to it. Accurately speaking, the relief asked was the removal of a cloud from the plaintiff's title; but the notice given would be quite as well understood as if it had named the relief with more accuracy. The statute does not contemplate that the notice shall detail the facts as they are stated in the petition. Since the notice describes the land and states the object of the suit, it is sufficient, and especially so when attacked collaterally.

3. The contention that the decree is void for want of an affidavit or statement in the petition that the defendants were non-residents presents a different question. The statute provides that if the plaintiff, or other person for him, shall allege in his petition, or file an affidavit, stating that part or all of the defendants are non-residents of the state, the court, or clerk in vacation, shall make an order of publication. The circuit court is a court of general jurisdiction,—a court which proceeds according to the course of the common law, and being such, the rule obtains in respect of the proceeding therein, that nothing shall be intended to be out of its jurisdiction but that which specially appears to be so.

The general rule also prevails in this state that the question of jurisdiction must be tried by the whole record. When it appears from the whole record that the court had no jurisdiction, either over the person or subject-matter, the judgment is void, and will be so treated in a collateral proceeding: *Brown v. Woody*, 64 Mo. 548; *Howard v. Thornton*, 50 Id. 292. In this case, the decree recites that the defendants had been duly notified by publication; and this recital is relied upon by this plaintiff as showing conclusively that an affidavit of non-residence was filed. This recital and the proof made at the previous term is conclusive that the order of publication was duly published in the designated newspaper; but if we

are to look to the whole record, then it is not conclusive that the order actually made was good and sufficient, nor that an affidavit for publication was filed. As said in the recent case of *Milner v. Shipley*, 94 Mo. 106, if there is any conflict between the recitals in the judgment, as to the terms of the order, and the order itself, the latter must control, for a recital of the order must yield to the order itself. So in the case of *Cloud v. Inhabitants*, 86 Id. 357, there was a recital that defendant had been duly served with process, but when the service was produced it proved to be worthless, and we held the judgment to be void,—a nullity. The same principle is clearly stated in *Crow v. Meyersieck*, 88 Id. 415, cited by plaintiff in this case. It is there in substance said that the notice was a part of the record, that it showed the infirmity on its face, and, when offered in evidence, contradicted the general recital of “due notice,” and thus a want of notice appeared from the whole record.

The order of publication in this case is good on its face; and the question is, whether the record shows the want of an affidavit. The order of publication states that plaintiff “files his petition, stating, among other things,” that defendants are non-residents. This, taken by itself, gives some support to the theory that the order was made, not on an affidavit, but on the petition, and there is no allegation of non-residence in the petition. But another portion of the same order says the defendants are notified “that an action has been commenced by petition and affidavit.” Taking the order as a whole, it leaves the inference that an affidavit had been filed. It certainly does not show that the order was made by the clerk without an affidavit, but leads to the contrary conclusion. There is nothing on the face of the record produced which specifically contradicts the general recital of due service, within the principle of the cases before cited.

The remaining question is, whether the failure to find an affidavit among the papers will overthrow the decree with its general recital of service by publication. The additional parol evidence is as follows: Mr. Jenkins testified that he had been clerk of the court since January, 1879; that the papers produced were on file during his term of office; that, to the best of his belief, there were not any other papers filed in said cause; that the papers produced were found in an envelope among the files of his office. Mr. Brugler testified that he made an examination of the papers in the case in 1880; that

he found them in their proper place in the clerk's office; that the papers produced were the only ones he found. The plaintiff says that after he learned that Brugler (the witness) and Hartman claimed title to the land, he made inquiry for the papers; that the deputy clerk made search and could not find them; that he first saw them at the term of the court at which this cause was tried; that he then got them from Mr. Brugler.

Mr. Freeman, speaking of the presumption in favor of the judgments of courts which have jurisdiction over the subject-matter, proceeds to say, in respect of the jurisdiction over the person against whom the judgment is obtained: "Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed, upon a collateral attack, that the court, if of general jurisdiction, has acted correctly, and with due authority, and its judgments will be as valid as though every fact necessary to jurisdiction affirmatively appeared. The decisions to this effect are very numerous. If a statute required a certain affidavit to be filed prior to the rendition of judgment, it will be presumed, in the absence of any statement or showing upon the subject, that such affidavit was filed": Freeman on Judgments, sec. 124. It is true that in *Howard v. Thornton*, 50 Mo. 291, it was said that "if the whole record taken together does not show that the court had jurisdiction over the defendant, then the judgment would be a nullity"; but the real question in that case was, whether a judgment could be impeached without producing the whole record. This doctrine, as it is stated in Freeman on Judgments, is approved in *Huxley v. Harrold*, 62 Mo. 516, and is assumed as a correct exposition of the law in the entire discussion in the case of *Cloud v. Inhabitants*, *supra*. Where an official act is shown to have been done in a manner substantially regular, formal requisites for the validity of the act are constantly presumed: *Hammond v. Gordon*, 93 Mo. 223.

There is nothing in this case to overcome the presumption that the court had jurisdiction over the defendants in the equity suit. The parol evidence, as to what papers were on file, does not reach a period of about ten years, beginning with the time when the suit was commenced. During that ten years plaintiff and his grantor paid all the taxes on the land, and paid delinquent taxes existing prior to 1870. The land was in the actual possession of the plaintiff's tenant in 1877. The deed from William C. Glenn, who was the father of William A.

Glenn, was not made until about ten years after the date of the decree, in 1881. This long acquiescence in the decree is wholly unexplained. Judgments of courts of general jurisdiction ought not to be overthrown and declared void in collateral proceedings on such a state of facts as exists in this case.

The judgment is, therefore, reversed, and the cause remanded.

JURISDICTION OF COURT OF GENERAL POWERS IS CONCLUSIVELY PRESUMED unless the judgment roll shows upon its face that the court did not have jurisdiction: See *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742, and note discussing the points raised in the principal case, including the question of attack upon judgments for improper service of process by publication. In *Biodgett v. Schaffer*, 94 Mo. 322, it is held that record recitals in the judgment as to service of summons are not conclusive where the service found in the judgment roll is fatally defective.

PUBLIC OFFICERS ARE PRESUMED TO HAVE PERFORMED THEIR DUTIES: See *National Bank v. Herold*, 74 Cal. 603; 5 Am. St. Rep. 476.

STATE CIRCUIT COURT IS ONE OF UNLIMITED and general jurisdiction, and its authority to proceed need not affirmatively appear: *Godfrey v. Godfrey*, 17 Ind. 6; 79 Am. Dec. 448. Where court is one of general jurisdiction, it is presumed to have jurisdiction until the contrary appears. Every presumption is made in favor of the jurisdiction of such court: *Butcher v. Bank of Brownsville*, 2 Kan. 70; 83 Am. Dec. 446; *Withers v. Patterson*, 27 Tex. 491; 86 Am. Dec. 643; unless the face of the record discloses want of such jurisdiction: *Washington etc. R. R. Co. v. Alexandria etc. R. R. Co.*, 19 Gratt. 592; 100 Am. Dec. 710; *Aspinwall v. Sabin*, 22 Neb. 73; 3 Am. St. Rep. 256; and examine the notes to these cases.

ACTS OF OFFICERS ARE LIBERALLY CONSTRUED, and the presumption in favor of the regularity of their acts can only be repelled by clear proof of their illegality: *Dubuc v. Voss*, 19 La. Ann. 210; 92 Am. Dec. 526, and note 529.

NAVE v. SMITH.

[95 MISSOURI, 596.]

PAROL PARTITION BETWEEN TENANTS IN COMMON, followed by possession, is sufficient to sever the possession, but the equitable title only passes which by adverse possession may ripen into a legal title.

CO-TENANT IN POSSESSION UNDER PAROL PARTITION may defend such possession, control the legal title, and compel its transfer to him.

WHERE AFTER PAROL PARTITION one tenant with the consent of his co-tenant disregards such partition and executes a mortgage on the undivided one half of the land, this is a revocation of such partition as between the parties to the mortgage.

WHERE CO-TENANT'S ATTACHING CREDITORS DISREGARD PAROL PARTITION and prosecute their suit, and buy the land as the undivided one half of such co-tenant, and then recognize a party holding under

the other co-tenant as the owner of the other one undivided half of the land, they cannot elect to affirm the parol partition, and thus defeat the title of the party recognized by them as their co-tenant.

AS BETWEEN TENANTS IN COMMON, STATUTE OF LIMITATIONS does not run when there is no adverse possession.

C. T. Garner, Sr., and J. R. Hamilton, for the appellant.

Ramey and Brown, for the respondent.

BLACK, J. The defendant appealed from a judgment in favor of the plaintiff in an action of ejectment for the undivided one half of eighty-five acres of land in De Kalb County. While this case is in many respects like that of *Nave v. Todd*, 83 Mo. 601, still there is some difference in the evidence, and this case is presented on a somewhat different theory, so that it will be considered on its own facts.

Prior to 1859, Henry C. Kerr and John C. Breckenridge owned two farms in De Kalb County as tenants in common, and they were also the joint owners of certain personal property. The defendant's evidence shows that in February of that year Kerr and Breckenridge divided their personal property, and also made a parol division of the land. The land was surveyed, and Kerr took 440 acres, being the improved portion of what is called the Canfield farm, and upon which he then and previously resided. Breckenridge took the residue of the Canfield farm and what is called the Breckenridge home farm, and upon which he resided. Kerr resided upon his portion until 1861, and it was in the possession of his tenant from that date to 1865 or 1866, while he was in the army. Breckenridge, by himself or tenants, occupied his portion until 1868. No deeds were made in 1859, and from the records of the county they appeared to be tenants in common, each owning the undivided half of the two farms. On the 5th of March, 1866, they executed and recorded a partition deed in conformity to the previous parol division.

Previous to this last-named date, and on the 19th of February, 1861, various creditors of Breckenridge attached his interest in both farms. On the 25th of the same month, Kerr made a mortgage to Nave, the present plaintiff, upon the undivided one half of the Breckenridge farm, to secure his note of that date to Nave for about nineteen hundred dollars, due in sixty days. This mortgage was made with the knowledge and at the request of Breckenridge. This note was given in lieu of one held by Nave against Breckenridge then past due. There is evidence to the effect that Kerr was also bound on

the old note. The attaching creditors prosecuted their suits to judgments, and the interest of Breckenridge in both farms was sold thereunder, and purchased by Saunders, who took the title in trust for the attaching creditors, the sheriff's deed to him being dated in 1868, the date of the sale. Nave foreclosed his mortgage on the undivided half of the Breckenridge farm, and became the purchaser of that interest at a sale under his judgment in 1865, and this is his title.

There was a subsequent suit between the attaching creditors and Saunders, which resulted in a decree for the sale of all the property purchased by Saunders; and at a sale under that decree, the defendant in this suit purchased the property in question and other property, and received a sheriff's deed, dated the 7th of October, 1875. The evidence shows that Saunders had possession of all of the property from 1868 to 1875, that he acted as the agent for the creditors of Breckenridge, and also for Nave. Nave, through Saunders, paid his share of the taxes on the Breckenridge farm for several years. The land was sold for delinquent taxes for 1861, 1863, and 1864, and by Saunders purchased in the names of Nave and King, the latter being one of the attaching creditors. The other facts deemed material will be noticed hereafter.

Defendant's position is, that by reason of a parol partition between Kerr and Breckenridge, in 1859, the latter acquired the legal, as well as the equitable, title to the land in suit, and that this title passed to him. It is certainly the law of this state that a parol partition between tenants in common, followed by possession, will be sufficient to sever the possession: *Bompart v. Roderman*, 24 Mo. 398. But in the subsequent case of *Hazen v. Barnett*, 50 Id. 506, it was held that while a parol partition followed by possession was good as between the parties, yet the equitable title only passed, which by adverse possession may ripen into a legal title. It was also held that a party to such parol partition has the right to have the same confirmed by a decree, vesting in him the legal title. There is a diversity of opinion in the books upon the subject as to whether the legal or simply the equitable title passes in such cases. It is certainly the policy of our statute that titles to real estate be made matter of record. Under the doctrine of the case last cited, the party taking possession of the part allotted to him will be able to defend his possession, control the legal title, and compel its transfer to him. We shall not depart from the rule of that case as applied to

like cases. The rights of Kerr and Breckenridge arising from the parol partition must be treated as equitable, not legal.

The evidence produced by the defendant shows a parol partition between Kerr and Breckenridge in 1859, followed by possession, or rather each continued in the possession of the part allotted to him. But it also appears that on the 15th of February, 1861, Breckenridge conveyed the undivided half of the Breckenridge farm to Andy and Adam A. Breckenridge. We infer this deed was made as a security for certain debts, but it recites that Kerr is the owner of the other undivided half, thus showing that, at that time, he disregarded the parol partition. On the 25th of the same month, Kerr made the mortgage to Nave on the undivided one half of the same land, and this mortgage was made at the request of Breckenridge. As between Nave on the one hand, and Kerr and Breckenridge on the other, the latter could not successfully set up a parol partition, for if there had been one, the execution of the mortgage by Kerr, with the consent of Breckenridge, would operate as a revocation of it. Under such circumstances, Breckenridge could not, as against Nave, claim with success the whole of the Breckenridge farm. The recital in the deed to Andy, and the mortgage to Nave, are inconsistent with full ownership of the Breckenridge farm by Breckenridge.

But it is urged that whatever interest Breckenridge had, whether legal or equitable, became subject to the attachments, and as they were levied on the 19th of February, 1861, the rights of the attaching creditors could not be affected by the Nave mortgage, made on the 25th of the same month. In other words, the subsequent acts of Kerr and Breckenridge and Nave could not prejudice the rights of the attaching creditors. All this would be true but for the course pursued by the attaching creditors. They, too, disregarded the alleged parol partition, for they prosecuted their suits from 1861 to 1868 against the interest of Breckenridge in both farms, and purchased that interest in the name of Saunders, and the suit between them and Saunders proceeds upon the theory that they had acquired an interest in both farms. Not only this, but Saunders treated Nave as the owner of the undivided half of the Breckenridge farm by calling upon him for one half of the taxes, which Nave paid, believing he had acquired the one-half interest. Kerr says he told Nave about the parol partition when the mortgage was made, but Nave says he had no knowledge that a partition had been made, and we conclude

proof of notice to him of such a partition is not made out. We do not say that the want of notice of itself on the part of Nave would defeat the attachments on the equitable interest of Breckenridge. Whatever there was of this parol partition was known to some of the attaching creditors. Their continued claim to an interest in the Kerr farm was a denial of a parol partition.

It is plain to be seen that Kerr and Breckenridge, in making the mortgage to Nave, acted upon the title as it appeared of record; that Nave has always claimed title according to the recorded deeds, and that the attaching creditors, through a series of years from 1861 to 1875, have disclaimed any binding parol partition by claiming the undivided one half of both farms. It is now too late for them, or those claiming under them, to turn around and say they got no interest in the Kerr farm, but got the whole of the Breckenridge farm. They cannot, at this late day, make their election to affirm the parol partition, and thereby defeat the plaintiff's mortgage. We are constrained to say there is no equity in the defense.

As to the statute of limitations, it is sufficient to say there is no evidence in the case upon which to base such a defense. Saunders was in possession from 1868 to 1875, and he recognized and treated Nave as a co-tenant, so that there was no adverse possession then. This suit was commenced in 1879. The judgment in this case was entered up for the whole of the described land, whereas it should have been for the undivided one half only. The plaintiff offers to remit one half of the damages recovered and the undivided one half of the land.

The *remittitur* will be allowed, and the judgment for the undivided half of the land and one half of the damages recovered affirmed, but the costs of this appeal must be taxed to the plaintiff.

PAROL PARTITION, FOLLOWED BY EXCLUSIVE POSSESSION and acts of ownership by the co-tenants, is binding on them and their heirs: *Wood v. Fleet*, 36 N. Y. 499; 93 Am. Dec. 528, and note; *Tomlin v. Hilyard*, 43 Ill. 300; 92 Am. Dec. 118, and extended note on the subject of parol partition.

PAROL PARTITION, FOLLOWED BY ADVERSE POSSESSION for twenty years, conveys the legal title: *Ballou v. Hale*, 47 N. H. 347; 93 Am. Dec. 438.

AFTER PAROL PARTITION, TENANT IN POSSESSION may compel the conveyance of the legal title: *Tomlin v. Hilyard*, 43 Ill. 300; 92 Am. Dec. 118, note 121.

STATUTE OF LIMITATIONS DOES NOT RUN as between co-tenants, unless there has been an actual ouster and adverse possession by one of them: *Holby v. Hawley*, 39 Vt. 525; 94 Am. Dec. 350, note 358.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

DEWEY v. ST. ALBANS TRUST COMPANY.

[60 VERMONT, 1.]

FORMER ADJUDICATION IN SAME CASE MAY BE AVAILED OF BY SETTING IT UP IN ANSWER, without putting the record thereof in evidence, where the petition expressly makes all prior proceedings in the case a part of itself, but omits to set them out, to avoid prolixity.

DECREE IS BINDING UPON WHOLE CLASS OF CREDITORS, where the rights of the whole class were, at the hearing, fairly represented and fully and honestly maintained and tried.

EXEMPTION TO RULE REQUIRING ALL PARTIES TO BE BEFORE COURT.—Cases in which the parties in interest are so numerous as to make it impracticable or greatly inconvenient and expensive to bring them all before the court form an exception to the rule that all persons having an interest in the subject-matter of the litigation should be before the court. And this exception applies to defendants as well as to plaintiffs. In a suit against a large number of persons, it is sufficient that such a number be made defendants as will fairly represent the interests of all standing in like character and responsibility.

DOCTRINE OF ESTOPPEL BY JUDGMENT DOES NOT APPLY TO CASE THAT IS AMBULATORY in its nature, and has ceased to be the same by progression. Where, therefore, on the petition of the receiver of an insolvent corporation whose charter provided that a preference should be given to the debts of minors, insane persons, and married women, in case of its dissolution by act of law or otherwise, it has been decreed that all the assets of the corporation shall be equally distributed among all the creditors, on the ground that no dissolution of the corporation was shown, such decree will not preclude all future inquiry into the matter; but in determining whether a dissolution is now shown, the inquiry must be confined to what has transpired in the time between the two proceedings. Relief cannot be granted on what existed before the first decree; and it is not sufficient to show a present state of things adequate to relief.

MERE INSOLVENCY IS NEVER SUFFICIENT EVIDENCE OF SURRENDER OF CORPORATE RIGHTS.

PETITION in chancery to obtain an order of preference. The cause was heard on the pleadings and the report of a special master, who found that the present financial condition of the trust company is that of hopeless insolvency; that its embarrassment is not temporary, but permanent; that none of the stockholders or officers intend to repair the impairment of the capital stock or to resume the business of the company; that the company has not attempted to perform any of the functions of a corporation since the appointment of a receiver; that the company has become inert, and has at present a mere nominal existence, and is, from lack of funds, incapable of performing its functions; and that during the last two years the value of its assets has steadily depreciated. The decree was that the petition be dismissed. Other facts are stated in the opinion.

Farrington and Post, and A. G. Safford, for the petitioners.

Hard and Cushman, and Stephen E. Royce, for the defendants.

ROWELL, J. Although the history of this case prior to the bringing of this petition fully appears in the report of it in 56 Vt. 476, yet it will be matter of convenience to restate it here as far as necessary to bring out the point now decided.

On August 17, 1883, the inspector of finance proceeded in chancery against the defendant company as an insolvent corporation, and obtained an injunction, restraining it from transacting any further business as a trust company, and from all custody of or interference with its books and property, except to keep and preserve the same until further order. He at the same time obtained the appointment of a receiver, who was ordered to take possession of the property of the company at once, and to administer it according to law, subject to the further order and direction of the court.

The charter of the company provides that in case of its "dissolution . . . by act of law or otherwise," the debts due from it, "incurred by deposits in favor of minors, insane persons, or married women,—such deposits having been made for married women in their own right,—shall have a preference and be satisfied before any other debts due from said corporation are paid."

The receiver took possession of the property and began to administer it, and on November 10, 1883, for the purpose of

obtaining the direction of the court in respect of such administration, he preferred his petition in the case, setting forth that on October 4, 1883, the court ordered that all creditors of the company should present and prove their claims by December 1, 1883; that pursuant to said order a large number of creditors had proved their claims, and that he had reason to believe that the rest of them would prove theirs within the time limited; and further setting forth the provisions of the charter above recited, and that a considerable number of persons had proved claims for debts due for deposits in favor of minors, insane persons, and married women in their own right, and insisted that said claims should be preferred and be satisfied before any other debts due from the company were paid; that he had realized a considerable amount of money from the assets of the company, and expected to realize more therefrom from time to time, and that it was for the interest of the creditors of the company that the funds realized and to be realized should be paid and distributed to and among them according to their legal rights as soon as might be; that the creditors who claimed no preference insisted upon an equal and a ratable payment and distribution of the funds to and among all the creditors; and praying for an order, directing him in the premises, and prescribing in what order, proportion, and manner payment and distribution should be made with reference to the demands for which preference was claimed, and with reference to the other debts of the company.

Notice of hearing on this petition on December 4, 1883, was given to all persons interested, by publication of the petition and an order of notice, three weeks successively in the St. Albans Messenger and Advertiser, and by acceptance of service by the chairman of the depositors' committee; and at the hearing, the receiver and counsel appeared and represented the general creditors, and counsel appeared and represented parties who claimed a preference, and a full hearing was had; whereupon it was ordered and decreed that all the depositors who had proved or should prove their claims as such stood and should stand "on terms of perfect equality of right to share in the division and distribution of the funds or assets of said company, and that no depositor or class of depositors is entitled to any preference over others," and the receiver was ordered to pay out and distribute the funds and assets accordingly. From this decree some of those claiming a preference appealed to this court, when the decree was affirmed and the

cause remanded. Subsequently, and in December, 1884, Mr. Kent and his wife—who was a depositor in the company in her own right and had proved her claim pursuant to order—preferred this petition in the case on behalf of themselves and all others in like interest who might choose to come in and share the expense, for the purpose of obtaining a preference under the charter; and divers other persons of like interest have come in, some of whom appealed from the former decree, and so were unquestionably parties to that adjudication.

The ground for claiming a preference before was and now is, not that the corporation has been dissolved by a judicial forfeiture of its charter, but that its state of suspended animation is death within the meaning of the charter, sufficient for the right of preference to attach.

The present petition is defended on two grounds, namely, that the former decree is conclusive, and that there is no dissolution within the meaning of the charter shown.

As to the first ground of defense: It is claimed that the former adjudication cannot be availed of here, though set up in the answer, because the record of it has not been put in evidence. But this was not necessary. That decree was made in this present case, the whole record of which was before the court of chancery, and this appeal has brought it all before this court: Rev. Laws, sec. 773; and the court can properly look into it, to see what has been done in the case, without requiring proof in the ordinary way: *Armstrong v. Colby*, 47 Vt. 359. And besides, the petition expressly makes all prior proceedings in the cause a part of itself, but omits to set them out, to avoid prolixity.

It appears that some of the parties that have here intervened were real parties to the proceedings that resulted in the former decree, and so are bound by it to some extent, certainly; but it is said that these petitioners and the rest that have intervened are not bound by it at all, as none of them were real parties to it, and that it does not appear that they had notice of the pendency of the proceedings so they could appear, had they desired to.

The depositors bear to the company the relation of creditors rather than of *cestuis que trust*: *Pope v. Savings Bank*, 56 Vt. 284; 48 Am. Rep. 781. And although under our statute the receiver probably stands as a representative of all the creditors,—High on Receivers, sec. 314; *Talmage v. Pell*, 7 N. Y. 323, 347,—yet, as here are conflicting interest between differ-

ent classes of creditors, and as a right of appeal is given to all persons in interest as in other cases,—Rev. Laws, sec. 3556,—there might be some incongruity in saying that the receiver was in court for all in a way to bind all; and more especially so as the decretal order shows that the receiver and Messrs. Noble and Smith appeared and represented the general creditors, and that Mr. Edson and Mr. Tenney appeared and represented parties claiming to be preferred creditors, from which it would seem that the receiver in point of fact represented the general creditors rather than those claiming a preference.

But the depositors are very numerous, there being more than two thousand four hundred of them, and more than eleven hundred claim a preference. Many of them are undoubtedly dead, some having and some not having personal representatives, and many may have removed from the state or originally lived out of it, so that it would have been entirely impracticable if not impossible to give personal notice to all, and the notice that was given was the only one that could well have been given. Under this notice there was an appearance before the chancellor on behalf of divers persons standing in the same interest as these petitioners and those who have intervened, and a full hearing was had, and an appeal was taken on behalf of eight married women and four minors, some of whom, as we have seen, intervene here, and the case was argued for them in this court by the same counsel who now argue it for the petitioners; and it can justly be said that the rights of the whole class claiming a preference were then fairly represented, and fully and honestly maintained and tried; therefore, on well-recognized principles, that decree ought to be held binding upon the whole class.

Although the general rule in equity is, that all persons having an interest in the subject-matter in litigation should be before the court, to the end that complete justice may be done and future litigation prevented, yet there is of necessity an exception to this rule when a failure of justice would ensue from its enforcement. It is said that the want of parties does not affect the jurisdiction, but addresses itself to the policy of the court; that the rule was made by the court for the promotion of justice, and may be modified by it for the same purpose, and is always more or less a matter of discretion depending on convenience: *Stimson v. Lewis*, 36 Vt. 91. Cases in which the parties in interest are so numerous as to make it impracticable or greatly inconvenient and expensive to bring

them all before the court, form an exception to the rule. And this exception applies to defendants as well as to plaintiffs. Take the case of a voluntary association of many persons. It is sufficient in a suit against them that such a number be made defendants as will fairly represent the interests of all standing in like character and responsibility: Story's Eq. Pl., sec. 116.

In *City of London v. Richmond*, 2 Vern. 420, which was a bill against the assignee of a lease for the payment of rent and the performance of covenants, it was held that by dividing his interest into a great many shares the assignee had made it impracticable to have all the sharers before the court.

In *Chancey v. May*, Prec. Ch., Finch's ed., 592, one reason given for overruling the demurrer for want of parties was, "that it would be impracticable to make all the proprietors parties, and there would be constant abatements by death and otherwise, and no coming at justice, if all were to be made parties."

In *Lloyd v. Loaring*, 6 Ves. 779, Lord Eldon said he had seen in the manuscript notes "strong passages as falling from Lord Hardwicke, that when a great many individuals are interested, there are more cases than those,—which are familiar,—of creditors and legatees in which the court will let a few represent the whole." He said that there was a very familiar case in which the court allowed a very few to represent the whole world.

In *Adair v. New River Co.*, 11 Ves. 429, he shows how one, having a general right at law to demand service to his mill from the inhabitants of a large district, sues in equity: "His demand is upon every individual not to grind corn for their own subsistence except at his mill. To bring actions against every person for subtracting that service is regarded as perfectly impracticable. Therefore a bill is filed to establish the right, and it is not necessary to bring in all the individuals; not because it is inexpedient, but because it is impracticable. The court therefore requires so many that it can be justly said they will fairly and honestly try the legal right between themselves, all other inhabitants, and the plaintiff; and when the legal right is thus established, the remedy in equity is very simple,—merely a bill, stating that the right has been established in such a proceeding, and upon that ground a court of equity will give the plaintiff relief against the defend-

ants in the second suit, represented only by those in the first suit": See also *Meux v. Maltby*, 2 Swanst. 277.

So the creditors of an insolvent debtor who execute the assignment, being numerous, and some of them out of the commonwealth, need not be made parties to a bill that concerns the assets: *Stevenson v. Austin*, 3 Met. 474.

In a suit by the receiver of a trust and banking company to foreclose a mortgage, the court said it would be oppressive to require all the creditors and stockholders to be made parties: *Mann v. Bruce*, 5 N. J. Eq. 413.

The general rule in equity is, that a nominal trustee cannot bring a suit in his own name alone, but must join the beneficiaries; still, it is said that the court will, in its discretion, dispense with the rule in cases of great inconvenience or of unnecessary expense: *Willink v. Canal and Banking Co.*, 4 N. J. Eq. 377.

Thus in *Van Vechten v. Terry*, 2 Johns. Ch. 197, which was a bill for the sale of premises mortgaged to the plaintiff by the defendants, who were trustees for 250 copartners, the court said it would be intolerably oppressive and burdensome to compel the plaintiff to bring in all the beneficiaries, and the delay and expense incident to such a requirement a reflection upon the justice of the court.

Stimson v. Lewis, 36 Vt. 91, was a bill to dissolve a partnership consisting of a great many members, and to close up its affairs and compel contribution; and it was held that all need not be made parties, though it was not said that absentees would be bound.

Here we have a current authority adopting, more or less, a general principle of exception by which the rule in equity, that all persons interested in the subject-matter of the litigation must be made parties, yields when justice requires it, in the instance of either plaintiffs or defendants. A rigid enforcement of the rule would lead to perpetual embarrassment, and in many cases to an absolute denial of justice; and we think this case, in respect of the binding quality of this decree, comes necessarily within the exception.

But to what extent is the decree binding? Certainly not to the extent of precluding all future inquiry into this matter, based upon things that have transpired since the institution of the former proceedings; for the doctrine of estoppel by judgment has no application to a case that is ambulatory in its

nature, and has ceased to be the same by progression: *People v. Mercein*, 3 Hill, 399; 38 Am. Dec. 644.

Thus, a judgment for the defendant in an action of trespass *quare clausum* is not conclusive upon the right of possession at a subsequent time, because intervening events may have restored the plaintiff to possession, or terminated the possession or the right that the defendant had at the former trial: *Thayer v. Carew*, 13 Allen, 82. And intervening events affecting the issue may be shown to prevent a former judgment from being conclusive even when the title has been tried in a writ of entry: *Perkins v. Parker*, 10 Id. 22.

The case turned before on the ground that no dissolution was shown; and the only proper inquiry on this point now is, whether one is now shown, produced by that which did not then exist, but has since transpired; and here we must be confined to the time between the institution of the two proceedings, which is a little more than a year.

This petition alleges that before and at the time of the appointment of the receiver, the company was not merely temporarily embarrassed and unable to meet its liabilities as they matured, but was hopelessly insolvent in fact; that since the appointment of the receiver no meetings of the stockholders nor of the directors have been held; that the directors have neglected to repair the capital stock by assessment, as required by the charter; that the president has absconded and is insolvent; that neither the officers nor the stockholders expect ever to resume the business of the company; that the funds and assets of the company are all gone, and its insolvency so hopeless that the depositors must suffer loss by reason thereof, and that legal remedies against it are unavailing; that it has become and is a mere nominal, inert body, incapable from its insolvency and lack of funds of hereafter carrying its franchise into effect; that on the appointment of the receiver it ceased to own any real or personal estate, and has acquired none since, and does not expect to acquire any; that since his appointment it has done no one act manifesting an intention to resume the exercise of any of its corporate functions; and that the design and being of the corporation has been fully and finally determined.

It will be noticed that some of these things are alleged to have existed before and at the time of the appointment of the receiver; some, from that time; and some, to now exist, without saying when they transpired, much less that they trans-

pired since the institution of the former proceedings, unless as matter of inference, and by way of continuation from an earlier period.

Nor does essential time appear from the report. Most of the things alleged are found to exist at the present time; but it does not appear when they transpired, except as to the depreciation of assets from former estimates, which is found to have been gradual and large during the last two years. But for aught that appears, these things may all have antedated the former proceedings to some extent, though probably intensified since by the mutations of time.

It is claimed that this changed condition in the value of assets is of itself alone sufficient to entitle the petitioners to be heard here on the merits. But mere insolvency, however hopeless, has never been held sufficient evidence of a surrender of corporate rights,—and this is the theory on which the cases go; and besides, it does not appear that the company was not before insolvent in fact. That the assets have since depreciated from former estimates does not show it. In the former proceedings the real financial condition of the company did not appear; but, as we have seen, this petition alleges that it was hopelessly insolvent before then, and this is probably true. It is not sufficient to show a present state of things adequate to relief, allowing that such a state is shown, which we do not undertake to say, without avoiding the force of the former decree by showing that those things have since transpired; otherwise we might override that decree, and grant relief for that which existed before but was not made to appear, which would be in effect a rehearing.

This makes it unnecessary to consider the other question involved, as to which we express no opinion.

Decree affirmed and case remanded.

ESTOPPEL BY JUDGMENT, GENERALLY: See the extended note to *Lea v. Lea*, 96 Am. Dec. 775 et seq. Doctrine of estoppel by judgment has no application to judgment that is ambulatory in its nature, and which has ceased to be the same by progression: *People v. Mercein*, 3 Hill, 399; 38 Am. Dec. 644. Before a judgment in one action can operate as a bar to another, it must appear from the record or from extrinsic evidence that the precise question involved in the second action was raised and determined in the first: *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436.

CORPORATION IS NOT NECESSARILY DISSOLVED BY INSOLVENCY: See *Germaniow R'y v. Filler*, 60 Pa. St. 124; 100 Am. Dec. 546, and note.

WHERE THE PARTIES ARE VERY NUMEROUS, all of them need not be made parties to an action affecting their interest: *Freeman on Judgments*, sec. 157.

WEED v. KEENAN.

[60 VERMONT, 74.]

RIGHT ACQUIRED BY PRESCRIPTION IS AS PERFECT AS ONE ACQUIRED BY GRANT, and nothing that the person who has thus acquired it can do, and no acknowledgment that he may make, can take away from him the right which has in this way become vested in him.

ASKING FROM OWNER OF LAND LEAVE TO RAISE FLASH-BOARD IS ACKNOWLEDGMENT of such owner's superior right, and will rebut the presumption of a grant, and interrupt the acquiring of the right to use the flash-board.

CASE for flowing the plaintiff's land. It appeared that the plaintiff purchased from Carruth. Defendant's evidence tended to show that he bought his mill property in 1857, and soon after built his present dam across the stream where an old dam had formerly stood; that he made the permanent structure of the dam eight feet high; that in 1867 he began for the first time to use the flash-board. Other facts are stated in the opinion.

Smith and Sloan, for the defendant.

R. M. Harvey, for the plaintiff.

ROYCE, C. J. We find no error in the charge. The jury were told, in regard to the conversation in evidence between the defendant and Robert Carruth, when defendant asked leave to raise the water or the dam, that if before that time the defendant had acquired the right by prescription to keep his original dam at the height he had kept it, that that prescriptive right would have become so perfected and completed in him by the lapse of the requisite period of fifteen years that nothing he could say, no acknowledgment he might make, could take away from him that right which had in such way become vested in him. There can be no doubt as to the correctness of the instruction. A right acquired by prescription is in all respects as perfect as one acquired by grant; it has the same validity and force: *Arbuckle v. Ward*, 29 Vt. 43; 3 Washburn on Real Property, 5th ed., p. 59.

It is claimed, however, that the instruction of the court had effect to take away from the jury the decision of the question whether what was said on this occasion between the defendant and Carruth had reference to raising the permanent structure of the dam or to the use of the flash-boards. We do not so understand it. It was not made to appear that the permanent structure of the dam was raised above the eight feet, the

prescriptive height; and the jury were told, in substance, that if the conversation had reference to any raising of the dam within the limit of the prescriptive height, then it amounted to nothing; for no acknowledgment on the part of the defendant could divest him of that already vested right. "So in that event," the court said, "whatever passed between Carruth and the defendant would have reference to only the flash-board." In other words, their talk either had reference to the raising of the dam by the use of the flash-boards above the eight feet, the height of the original structure, or it amounted to nothing.

Then the jury were further told that if the conversation had reference to the use of the flash-boards, then it was an acknowledgment of a superior right in Carruth, and that "such an asking of leave, such an acknowledgment, would rebut the presumption of a grant, and interrupt the acquiring of any right to use that flash-board on the part of the defendant." There can be no doubt of this: *Mitchell v. Walker*, 2 Aiken, 266; 16 Am. Dec. 710; *Wilder v. Wheeldon*, 56 Vt. 344. Authorities might be multiplied on this point, but there is no need of further citations.

Finally, in summing up, the jury were told that it was important for them to determine precisely what transpired between the parties, and whether it amounted to an acknowledgment on the part of the defendant of the superior right of Carruth, remembering that if the defendant had acquired by prescription the right to keep his eight-foot dam, whatever he said could not take away that right; but that if what transpired was during the time that he claimed to have acquired the right to keep his flash-board, which he commenced to put on in 1867, as this conversation was thirteen years ago, he had not acquired the right by prescription as touching the flash-boards. Then the jury were instructed to state in their verdict, if it should be for the plaintiff, whether it was rendered because of the permanent structure overflowing the land, or solely on the ground of the use of the flash-board. The foreman informed the court that the damages were given in consequence of the use of the flash-board. To have reached this result the jury must have made up their minds that the conversation between the defendant and Carruth had reference to the use of the flash-boards, and then following the instructions of the court that such an acknowledgment of a superior right in Carruth would rebut the presumption of a grant, they

found that the defendant had not acquired the prescriptive right he claimed to the use of the flash-boards, and so made up their verdict. The result was logical, and should not be disturbed.

Judgment affirmed.

ADVERSE POSSESSION WILL CONVEY TITLE AS COMPLETE AS ANY WRITTEN CONVEYANCE: See *Nelson v. Brodback*, 44 Mo. 596; 100 Am. Dec. 328.

ADMISSION BY OCCUPANT OF RIGHT OF OWNER OF LAND will rebut presumption of grant from adverse possession: *Mitchell v. Walker*, 2 Aiken, 266; 16 Am. Dec. 710; *Austin v. Bailey*, 37 Vt. 219; 86 Am. Dec. 708.

TILLOTSON v. PRICHARD.

[60 VERMONT, 94.]

PAYMENT OF TAXES ON LAND IS NOT ACT OF POSSESSION, nor is it evidence of a possessory title.

DECLARATION WHICH COUNTS ON COVENANTS OF SEISIN AND RIGHT TO CONVEY MAY BE AMENDED by adding a count upon the covenant of warranty, and such amendment may be made after the evidence has been heard by the referee.

COVENANT OF WARRANTY RUNS WITH LAND AS INCIDENT TO IT, notwithstanding the grantor had neither title nor possession, if the grantee has had possession; and a grantee holding under meane conveyances, who is evicted, may maintain an action upon such covenant.

COURT CAN PROTECT DEFENDANT LIABLE TO TWO ACTIONS—one by his grantee for a breach of the covenant of seisin, and another by an assignee of his grantee upon that of warranty—by attaching conditions to the judgment, or by staying execution.

ACTION FOR BREACH OF COVENANT OF WARRANTY IS TRANSITORY by the Vermont statute; and the courts of that state, when the grantor resides there, have jurisdiction of such action, although the land is in another state.

PLAN OF LANDS, THOUGH IN PART COPY OF GOVERNMENT SURVEY, MAY BE USED ON TRIAL by a surveyor testifying as a witness.

DECLARATIONS OF EVICTOR AND OF HIS WORKMEN ON LAND ARE EVIDENCE to show an eviction.

HUSBAND CONSENTS TO HIS WIFE'S BEING WITNESS when he offers in evidence a deed witnessed by her.

DEED TO PLAINTIFF UNDER WHICH HE CLAIMS THAT COVENANT OF WARRANTY CAME TO HIM is admissible in evidence in an action for the breach of such covenant, to show an assignment of the land to him.

LEX LOCI REI SITÆ GOVERNS IN ACTION FOR BREACH OF COVENANT OF WARRANTY. In an action for breach of covenant of warranty, where the grantor resides in Vermont, the grantee in New Hampshire, and the land is situated in Minnesota, the construction and force of the contract, including the rule as to damages, must be governed by the law of Minnesota. And if the referee fails to find what the law of Minnesota is, the supreme court of Vermont will decline to presume that the law of Min-

nesota is the same as that of Vermont, but will recommit the case to the court below to determine the damages according to the rule in Minnesota.

ACTION of covenant broken. On the hearing, the plaintiff relied on the covenant of warranty only. The declarations referred to in the opinion, as contained in exceptions 23 and 24, were to the effect that Reed, Sherwood, and Knight owned the land in controversy. Other facts are stated in the opinion.

Farnham and Chamberlain, and Barrett and Barrett, for the plaintiff.

Heath and Willard, and J. K. Darling, for the defendant.

TART, J. The defendant, George Prichard, conveyed the land in question to Daniel F. Tillotson and Henry Dame, by deed, containing the usual covenants, dated the fourth day of June, 1866; by subsequent deeds of conveyance the interest of Dame passed to Tillotson, and the latter, on the eighteenth day of May, 1882, conveyed the premises to the plaintiff.

1. At the time Prichard conveyed the premises to Tillotson and Dame, he did not hold the legal title to them, nor did he have possession of the same, unless the payment of taxes constituted possession. The payment of taxes is not an act of possession, and is not evidence of a possessory title: *Reed v. Field*, 15 Vt. 672. Prichard, therefore, at the time of his deed, had neither title nor possession.

2. After the conveyance of the land by Prichard to Tillotson and Dame, the latter entered into actual possession of the premises, and they and their grantees in the chain of title continued in possession until the plaintiff was evicted in December, 1882, by Reed, Sherwood, and Knight, under an elder and better title. This action is covenant, the original declaration counting upon the covenants of seisin and right to convey. The court permitted an amendment declaring upon the covenant of warranty. The defendant claims that the court had no power to permit the amendment, which is true, if it introduced a new cause of action. Was the cause of action introduced by the amendment a new one, or a different description of the cause originally declared upon? The original declaration says that the defendant hath not kept his covenants, for that he was not lawfully seised, and had not good right to sell and convey the premises, and for that Reed and others were the lawful owners, and hath evicted the plaintiff, and driven him from the possession of said land. The amended declara-

tion adds the fact that the defendant hath not warranted the said premises, and for the same reasons alleged in the original declaration. Where the original declaration counted upon the covenant against encumbrances, it was held by this court that an amendment adding a count upon the covenant of warranty was properly allowed: *Boyd v. Bartlett*, 36 Vt. 9. This case justified the ruling of the court below, and we think is correct in principle. The defendant insists there was error, for the reason that the amendment was not permitted until after the evidence had been heard by the referee. It has been many times held that judgment should be entered upon the report of a referee, whenever, without changing the nature of the action, the declaration or pleadings could be so amended as to accommodate them to the facts found by the referee: *Roberts's Digest*, tit. Reference, I, subds. 5, 6, and cases cited. We think, under this rule, the time when the declaration was amended was immaterial.

3. The plaintiff claims to recover upon the covenant of warranty only. This covenant is one of those that run with the land, and is intended for the benefit of the ultimate grantee in whose time it is broken: *Williams v. Wetherbee*, 1 Aiken, 233. Until breach, the covenant passes with the estate by purchase, and can be enforced when broken by the covenantee or his representatives, or, if the estate has been assigned, by the assignee of the covenantee, who claims under the seisin vested in him: *Rawle on Covenants*, sec. 213. The covenant attached to a grant does not pass by the deed from the covenantee to his assignee, but only by the land conveyed. It passes not by the form of the conveyance, but merely as an incident to the land; so when the grantee takes no estate under the grant, no assignment of the land by him can transfer it to the assignee. As it is not capable of a direct transfer, so as to enable the assignee to maintain an action for its breach in his own name, it cannot pass by the operation of the assignment, for it cannot run with the land which the grantee does not have to convey. And this doctrine, *Rawle* in his work on covenants says, prevails generally throughout the United States. In 1 *Smith's Leading Cases*, 183, in the notes to *Spencer's Case*, 5 Coke, 16, it is stated that in England when nothing but bare possession of the land passes by the conveyance, the covenant does not pass, either by the direct or indirect operation of the assignment. But the tendency of the American cases is to hold that possession is a sufficient estate

to cause the covenant to attach to the land, and upon an assignment or transfer of the land by the covenantee to pass to the assignee: Rawle on Covenants, sec. 223. Possession is an estate that in time may ripen into a perfect title. The defendant's counsel insist that it was necessary that the covenantor, Prichard, should have had possession; that possession in the covenantees was not sufficient to attach the covenant to the land; and that it could not be made to attach by any possession of the covenantees taken by them subsequently to the grant. The referee finds that Tillotson and Dame took actual possession of the premises under their deed from Prichard. The covenant of warranty was of force in their hands by privity of contract, and when they sold the land, having taken possession of it under their deed, the covenant attached to the land and passed with it to the grantee. The first time the question whether the covenant passes, as attached to the land, can arise is when the covenantee assigns the estate; and if he then has possession of the land, holding it under his deed, why does not the covenant pass with the land? To so hold does no injustice to the covenantor. He is only called upon to make good his covenant.

It is said a grantor may be liable to his grantee in an action for a breach of the covenant of seisin, and to an assignee of the grantee upon that of warranty. Concede this to be true, the court can properly protect the rights of the defendant in either case, by attaching such appendages to the judgment, or staying the execution, as will prevent injustice in any event whatever; as was done in *Catlin v. Hurlburt*, 3 Vt. 403. In that case the plaintiff had conveyed the land to Lynde Catlin, and then brought his action on the covenant of seisin. The court, giving judgment for the plaintiff, ordered stay of execution until the plaintiff procured from Lynde Catlin, and lodged with the clerk for the benefit of the defendant, either a quitclaim deed of the premises, or a suitable discharge of the covenant of warranty contained in the defendant's deed to the plaintiff. And see *Blake v. Burnham*, 29 Vt. 437. In case the defendant apprehends any danger from a second action, he can apply to the court, at the time of final judgment, for such orders in respect thereto as he thinks he is entitled to. Can it be in any manner consistently claimed that the land in question with the covenant did not pass to the plaintiff by virtue of the deed from the defendant? Can he say it is not his deed? He conveyed the land, his grantees took possession

of it, and conveyed it to the plaintiff. And is not their possession, tortious though it may be against the lawful owner, derived from and under the deed from the grantor? And if so, why did not the covenant pass to them with the possession? We think the covenant passed, as attached to the estate, when the grantees, having taken possession under their deed, conveyed the premises to the plaintiff: *Rawle on Covenants*, sec. 233; *Beddoe v. Wadsworth*, 21 Wend. 120; *Wead v. Larkin*, 54 Ill. 489; *Allen v. Kennedy*, 91 Mo. 324; *Fields v. Squires*, 1 Deady, 386.

It may be well, in this connection, to refer to the precedents of the declarations in actions in this state for the breach of the covenants of warranty. In *Williams v. Wetherbee*, *supra*, the premises had come to the plaintiff through several meane conveyances, and after the allegation of the conveyance to the plaintiff it is alleged, "whereby the plaintiff became seised and possessed of the premises," it being nowhere alleged that the defendant or any of the prior assignees had ever been in possession of the premises. It was argued under the demurrer to the pleas that the declaration itself was defective in that it did not allege that the plaintiff entered into possession of the premises and was evicted; but the court held that the allegation "whereby he became possessed," etc., was a sufficient allegation of the possession. In *Beardsley v. Knight*, 4 Vt. 471, after setting forth the execution by the defendant of the deed containing the covenant, and the assignment of the land to the plaintiff by Hatch, the covenantee, it is alleged that Beardsley, the plaintiff, and assignee of the covenant, entered into possession of the premises, without any allegation that Beardsley, the covenantor, or Hatch, the covenantee, was ever in possession of the same. In *Wilder v. Davenport's Estate*, 58 Vt. 642, an action for the breach of the covenant of warranty in favor of an assignee of the covenant, Davenport, when his deed was given, was not in possession of, and had no title to, the land. He deeded, with covenant of warranty, to Potter, the latter in like manner to Booth, who subsequently quit-claimed to the plaintiff, Wilder. Judgment was rendered in the supreme court for the plaintiff. It is true that the question now under consideration was not raised in the above cases; but it can hardly be supposed that it would have escaped the attention of the able counsel engaged, had they regarded it as a tenable one. The cases indicate how the question has been regarded heretofore by the bar in this

state; for if possession by the covenantor had been necessary to cause the covenant to attach to the land, it would no doubt have been so alleged in the declaration; and if not so alleged, the declaration would probably have been met by a demurrer.

4. The defendant contends that this court has no jurisdiction of the action; that it is local, and can only be maintained in the state where the land lies. Such, undoubtedly, was the rule at common law. By that law, if the action for the breach of a covenant was founded upon privity of contract it was transitory; e. g., covenant between the original parties; but if upon privity of estate, it was local. By this rule, all actions brought by the assignee of an estate conveyed with covenants running with the land, against the covenantor, to enforce such covenants, were local. In covenants concerning land, an assignee of the land is a stranger to the personal contract between the parties thereto; he is not privy to it; and the only right he has to maintain an action in his own name for their breach is upon those covenants which "run with the land," or in other words, those which follow the interest demised; and hence the action is said to be founded upon privity of estate. It is when the right or obligation created by the covenant is attached to the interest conveyed or to the estate out of which it is created, so that the right or obligation upon an assignment of the estate devolves upon the assignee: Gould's Pleading, c. 3, sec. 118, div. 2; Chitty's Pleading, 270. But it is argued that the action is local, for that in case of a judgment against the defendant he is entitled to an order from the court requiring a conveyance to him from the plaintiff of the lands in controversy, and the order could not be effectually made by a court in this state; and cite the cases of *Catlin v. Hurlburt*, *supra*, and *Shorthill v. Ferguson*, 47 Iowa, 284. We do not say that the defendant is entitled as matter of right to such an order. The latter case was in equity, and the court held that, before it would enter judgment for the plaintiff, he must tender a conveyance of the land to the defendant; the same result being reached in the other case cited, by stay of execution. The judgment of the court in such cases does not affect the title to the land, by any direct action or process, against the land itself; but the court, having obtained jurisdiction of the person of the owner, it may, in a proper case, decline to enter judgment, or it may stay execution after judgment, until he make such conveyance as justice requires him to do, as a condition of obtaining judgment

and execution. Indeed, cases in equity go much further: *Rorer on Interstate Law*, 207, 211. The judgment in no way affects the real estate; it is in *personam*, sounding in damages only. But it is enough to say that the common law, as to certain actions, including the one at bar, being local, has been superseded by our statute, regulating the places in which actions shall be brought, and none are local unless made so by statute: *Hunt v. Pownal*, 9 Vt. 411; *June v. Conant*, 17 Id. 656; *University of Vermont v. Joslyn*, 21 Id. 52. This action by our statute is transitory.

5. The defendant filed sixty-two exceptions to the report of the referee. Except those numbered 15, 18, 22, 23, 24, 31, 33, 37, 43, 48, 51, and 52, they are either waived or rendered immaterial by the disposition of questions already made. Nos. 15, 18, 22, and 43 relate to a plan of the land, made by a surveyor, and used by him when testifying. There was no error in permitting its use. The main reason urged against its use is, that it was in part a copy of the government survey. This did not render it objectional, but rather tended to add to its correctness. It was made by the witness from surveys of the government and his own observations. Such plans are constantly used in trials, and oftentimes are of great service. The exceptions Nos. 23 and 24, relating to the declarations of Reed, Sherwood, and Knight, and their workmen on the land, in the year 1882, we think were legitimate evidence to show an eviction of the plaintiff.

We have not been furnished with a copy of the testimony of Tillotson, referred to in exceptions Nos. 31, 33, and 52, nor the depositions or copies thereof referred to in Nos. 37, 43, and 51; therefore are unable to say that there was any error in the referee's rulings. This disposes of the exceptions to the report, relied upon at the hearing.

6. The deed of Daniel F. Tillotson to the plaintiff, purporting to convey the land in question, and under which the plaintiff claims that the covenant of warranty came to him, was executed in the presence of two witnesses, one of whom was the wife of the plaintiff. The defendant claims it was not properly executed. The law of Minnesota required two witnesses to the execution of a deed: Gen. Stats. Minn. 1878, 535, sec. 7. The test of competency, as stated in *Morrill v. Morrill*, 53 Vt. 74, 38 Am. Rep. 659, is the ability of the witness, at the time of the attestation, to testify. By the law of Minnesota she was a competent witness, and could be ex-

amined with the consent of her husband: Gen. Stats. Minn. 1878, 792, secs. 7, 10, subd. 1. We think when the plaintiff offered the deed in evidence, he did consent to her being a witness. The deed was not objected to when offered in evidence, for the reason that it was defectively executed. It was pertinent evidence tending to show an assignment of the land to the plaintiff, and not being objected to because not properly witnessed, became legitimate evidence. *Quære*, whether a deed defectively executed is not good between the parties to it: *Fitch v. Lewiston Steam Mill Co.*, 80 Me. 84.

7. The covenant sought to be enforced was contained in a deed executed in Vermont, the grantor domiciled there, the grantees in New Hampshire. The land described in the deed was located in Minnesota. The question arises, By what law is the contract to be governed? The defendant insists that the questions "must be decided according to Minnesota law"; and the plaintiff's counsel invoke the aid of that law upon the questions of the execution of the deed and the transitory character of the action. The contract being one which could only be performed in Minnesota, the parties evidently had in view the law of that state in reference to its execution. We think its construction and force, including the rule as to damages, must be governed by the law of that state: 2 Kent's Com. 459. "The law of the place where performance is to occur governs in respect to the validity and performance of contracts made in one state but to be performed in another": Rorer on Inter state Law, 50. "Matters connected with . . . performance are regulated by the law prevailing at the place of performance": *Scudder v. Bank*, 91 U. S. 406, 413. The plaintiff claims damages under the rule in this state, viz., the value of the premises at the time of the eviction. The referee makes no finding of what the law of Minnesota is. It should have been found as a fact. No claim is made that we should presume it to be the same as the law of this state, as we perhaps have the power to do: *Ward v. Morrison*, 25 Vt. 593.

We hold upon the facts reported that the plaintiff is entitled to a judgment; but instead of rendering one for nominal damages, as is sometimes done in cases where the actual damages are not shown, or presuming that the law of Minnesota is the same as that of Vermont for the value of the premises at the time of the eviction, which might work great injustice, as the plaintiff is by right entitled only to damages accorded him by the law of Minnesota, and the court below having no

occasion to examine the subject of damages, the judgment there having been for the defendant, we reverse the judgment, and remand the case, that the county court may determine, by a recommittal of the report or otherwise, what damages the plaintiff is entitled to by the rule which obtains in Minnesota, and render judgment accordingly.

Judgment reversed and cause remanded.

PAYMENT OF TAXES BY CLAIMANT OF LAND, THOUGH FACT TO BE WEIGHED in determining question of adverse possession, is not of itself evidence of such possession: *Draper v. Shoot*, 25 Mo. 197; 69 Am. Dec. 462, and note.

COVENANT OF WARRANTY RUNS WITH LAND: See *Brown v. McM.*, 33 Ill. 339; 85 Am. Dec. 277; *Bostwick v. Williams*, 36 Ill. 65; 85 Am. Dec. 385.

CONTRACTS RELATING TO IMMOVABLES ARE GOVERNED BY THE *LEX LOCI* *RE SITAE*: *Isely v. Leland*, 42 Miss. 444; 97 Am. Dec. 475, and note.

PEASLEE v. FLETCHER'S ESTATE.

[69 VERMONT, 122.]

GENERAL WORDS IN WILL, FOLLOWING AFTER AND COUPLED WITH WORDS OF LIMITED SIGNIFICATION, are restricted to the same class of things as the former, except where such general words are in a residuary clause. The clause, "All my personal goods and chattels on said premises at the time of my decease," will not therefore pass promissory notes and money of the testatrix on the premises at the time of her decease, the clause being preceded by the words, "with my household furniture," there being also a residuary clause in the will, and the amount of money and notes kept on the premises not being definite, but often varying with varying circumstances.

APPEAL from a decree of the probate court. The opinion states the case.

Hard and Cushing, for the plaintiff.

W. L. Burnap and George W. Wales, for the defendant.

TYLER, J. The only question presented by the bill of exceptions in this case arises in construing the following clause in the will of Mary M. Fletcher, late of the city of Burlington, deceased, or rather that part of the clause which relates to the bequest of the personal estate of the testatrix:—

"I give to my uncle, George L. Peaslee, of Auburn, Maine, my home place on Prospect Street in said Burlington, with my household furniture, and all my personal goods and chattels on said premises at the time of my decease."

The plaintiff, who is the devisee mentioned in said clause, claims that the words, "All my personal goods and chattels on said premises at the time of my decease," are operative to pass to him seven promissory notes of one thousand dollars each, which the testatrix held against one Manwell, and \$1,100.18 in money, which were in the house or "home place" of the testatrix when she died.

In giving construction to this clause, we must consider all the words contained in it, and also its relation to the other portions of the will, in order to ascertain, if possible, the testatrix's real intention.

It appears by the bill of exceptions that she was accustomed to keep her promissory notes and other like securities in her house, and that at the time of the execution of this will, which was during an illness from which she did not expect to recover, she had in her house, besides the notes in controversy, other promissory notes amounting to about eighty thousand dollars; also that she was in the habit of having certain United States bonds brought from the banks in the city, where she usually kept them, to her house, where they would remain during the day while she cut off the coupons.

It is true that the word "chattels" has a broad enough signification to include promissory notes and bank bills, and in many locations in a written instrument, it would be construed to include them; but in this case, if it had been the intention of the testatrix to bequeath to the plaintiff so large an amount of money and personal securities as was often in her house and liable to be there at her decease, it is hardly reasonable to suppose that she would have employed so general and inapt a term as "goods and chattels" for that purpose, when she obviously might have bequeathed them in unmistakable language. Had she intended to give her uncle all such promissory notes and money on hand, or any part thereof, it is fairly presumable that she would have said so plainly.

Again, we must consider all the language of the clause in question,—the words "my household furniture" as well as "my personal goods and chattels," and determine, if we can, what relation the respective words bear to each other, whether or not the latter are restricted in their meaning by the former. The authorities on this point are numerous and somewhat conflicting; but we find that the general current of them, both in England and in this country, is, that except in residuary

clauses, general words, such as "goods" and "chattels," when following after and coupled with words of a limited signification, are restricted to the same class as the former: Williams on Executors, 1015, 1017, and cases cited. Thus where the testator bequeathed to his niece all his goods, chattels, household stuff, furniture, and other things, which should be in his house at A, it was decreed that cash found at the testator's house did not pass; for by the words "other things" should be intended things of like nature and species with those before specified: *Trafford v. Berrige*, 1 Eq. Cas. Abr. 201. Jarman, in his work on wills, cites the case of *Lamphier v. Despard*, 2 Dru. & War. 59, where a testator, after devising certain real estate to his wife, bequeathed to her all his household furniture, plate, house linen, and "all other chattel property that he might die seised or possessed of," and after various legacies he appointed A his executor and residuary legatee. Sir Edward Sugden held that "all other chattel property" meant all *ejusdem generis*, relying partly on the subsequent residuary gift. He thought, however, that the words would clearly not pass money, so that the clause could not be a general bequest of the entire personal estate.

In *Rawlins v. Jennings*, 13 Ves. Jr. 36, the bequest was, "unto my wife, Alice Jennings, 200 pounds per year, being part of the moneys I now have in bank security, entirely for her own use and disposal, together with all my household furniture and effects of what nature or kind soever that I may be possessed of at the time of my decease." The master of the rolls said: "The second question arises upon the widow's claim of the whole residue of the personal estate, as passing to her under the general word 'effects.' That claim cannot be sustained. Part of his property being particularly given to her afterwards, the word 'effects' must receive a more limited interpretation, and must be confined to articles *ejusdem generis* with those specified in the preceding part of the sentence, viz., household furniture."

In *Dole v. Johnson*, 3 Allen, 364, the testator bequeathed to his widow all his household furniture, wearing apparel, and all the rest and residue of his personal property. Hoar, J., in construing this clause, said: "We think the meaning of the whole will is made most consistent by restricting the word 'property' to chattels *ejusdem generis* with those enumerated. By this construction the widow will take absolutely the household furniture, wearing apparel, and other chattels in and about

the house of the testator, adapted to personal use and convenience, such as books, pictures, provisions, watches, plate, carriages, domestic animals, and the like, but not including money, stocks, securities, or evidences of debt."

In *Johnson v. Goss*, 128 Mass. 433, where the bequest was as follows: "I give to my wife all my personal property, my household effects, horses, carriages, life insurance, etc.,"—the court held that this general term, "all my personal property," was not used in its ordinary sense, that the language did not purport to bequeath the residuum of the testator's property, and construing it in connection with the words immediately following, "my household effects," etc., that the testator's purpose was to describe property of the same kind, and that he used the adjective "personal" as descriptive of chattels of personal use and convenience, not including stocks, securities, or other productive property.

In *Benton v. Benton*, 63 N. H. 289, 56 Am. Rep. 512, the bequest was as follows: "I give my wife every article of household furniture, books, etc., and every other article of personal property in and about said homestead, or wherever found belonging to my estate"; and under it the widow and the residuary legatees both claimed the bank shares, notes, and cash on hand. The court held that the words, "every other article of personal property," were limited to the same class of things as those enumerated, and did not include the bank stock, notes, and cash claimed by the widow.

Were there no residuary clause in this will, the words in question might and probably would be construed to pass this property to the plaintiff, for the reason that courts are always disposed to give the broadest meaning practicable to the words of a bequest when it is necessary to do so in order to prevent intestacy. The same is true when words of a general signification are found in the residuary clause itself, and for the same reason. Jarman, in commenting upon cases which indicate the disposition of judges of the present day to adhere to the rule which gives to words of a comprehensive import their full extent of operation, remarks, however, "that in all the preceding cases there was no other bequest capable of operating on the general residue of the testator's personal estate, if the clause in question did not. Where there is such a bequest it supplies an argument of no inconsiderable weight in favor of the restricted construction which is then recommended by the

anxiety always felt to give to a will such a construction as will render every part of it sensible, consistent, and effective."

Many of the cases cited by the plaintiff's counsel are upon the construction of residuary clauses in wills. Such is the case of *Parker v. Marchant*, 20 Eng. Ch. 290, where it was held that the words "goods, chattels, and effects," after an enumeration of various articles, carried the residue of the testator's property. The vice-chancellor, in considering the point whether by these words the testator had disposed of the general residue of his personal estate or had so far died intestate, said: "This turns upon the meaning to be attributed to the words, 'goods, chattels, and effects,' having regard to the position in which they are found in the will, and having regard also to the whole contents of the will." Such also is the case of *Brown v. Cogswell*, 5 Allen, 556.

The will under consideration contains a residuary clause. After the bequest to her uncle the testatrix gave all the residue of her estate, except two small legacies, to the Mary Fletcher Hospital.

Upon these well-recognized rules of construction, we hold that the words "goods and chattels," in the connection in which they are found, should be construed as having only a restricted and limited signification, and as not including said Manwell notes and cash on hand; that they are further restricted in their meaning by the word "personal," which indicates, when considered in its relations to the words "household furniture," that the testatrix intended by the words in question to bequeath only other articles of the same kind, belonging to the house, "savoring of the locality," adapted and pertaining to her personal use. This view is sustained by the fact that no definite amount of money and notes was kept at the house. It often varied with varying circumstances, and the notes and money were carried away and brought back as the testatrix had occasion to go from or return to her home, and were being removed when she died.

To give these words the broad meaning claimed for them by the plaintiff would be to invest them with power by which they might have defeated what seems to have been the main purpose of the will, namely, the endowment of said hospital; for, at times, nearly the entire personal estate of the testatrix was in her house.

In the view we have taken of this case, the testimony of the plaintiff, received by the court below, was wholly immaterial.

The result is, the judgment of that court is affirmed, and certified to the probate court.

WILL GIVING TO WIDOW "all my personal property which she may think proper," and directing that the rest of said property shall be sold, was held not to pass money in testator's possession, nor choses in action: *German v. German*, 27 Pa. St. 116; 67 Am. Dec. 451, and note. So in *Benton v. Benton*, 63 N. H. 289, 56 Am. Rep. 512, a bequest of "all of the household furniture on the homestead, including piano, books, etc., and every article of personal property in and about the premises," was held not to pass money or choses in action.

CLARK v. SNOW.

[60 VERMONT, 205.]

RECOVERY MAY BE HAD IN ACTION AT LAW ON LOST NOTE payable to order, but not negotiated, although it is not shown to have been destroyed.

ASSUMPSIT. The opinion states the case.

Pitkin and Huss, for the plaintiff.

John G. Wing, for the defendant.

BOYCE, C. J. The referee finds, among other facts, that the note on which plaintiff claims to recover in this action was lost, that it had never been negotiated, and that it has never been paid. The note was payable to the order of J. W. Clark, was lost soon after its execution, and a copy of it was made and was proved before the referee. The note was not shown to have been destroyed.

The only question that arises for our consideration is, whether the plaintiff's remedy is at law, or whether he must go to equity.

It is said that "the mere loss of an instrument will not be sufficient to give equity jurisdiction, but the party must show that he has no remedy or no sufficient remedy at law." The loss "must obstruct the right of the plaintiff at law, or leave him exposed to undue peril in the future assertion of such rights": Bispham's Principles of Equity, sec. 177. The main object of the equitable jurisdiction seems to be that a recovery may be had, and at the same time the defendant may be indemnified against any possible liability growing out of the subsequent discovery of the lost instrument: *Id.*

We have already held that an action at law may be main-

tained, and is the proper action on a lost note not negotiable or not negotiated: *Lazell v. Lazell*, 12 Vt. 448; 36 Am. Dec. 352; *Hopkins v. Adams*, 20 Vt. 407; *Hough v. Barton*, 20 Id. 455.

In *Lazell v. Lazell*, *supra*, it was decided that to defeat an action at law on a note, the defendant must show affirmatively that the note was negotiable, and had been actually negotiated, or that it was payable to bearer, so as to pass by delivery. In *Hopkins v. Adams*, *supra*, the grounds of the equitable jurisdiction were exhaustively considered by Judge Redfield in the opinion, where he says that in the case of promissory notes "not negotiable, or not negotiated, where the loser may sue at law, the principal ground of the jurisdiction must be the necessity of discovery, and the accident by which that which the parties have constituted their contract has become incapable of performing its destined office."

It remains only to consider whether the recent decision in *Adams v. Edmunds*, 55 Vt. 352, is in conflict with the principle announced in the former decisions, and ought to govern this case. The note there was payable to bearer, and a note so payable, as remarked in *Lazell v. Lazell*, *supra*, passes by delivery. The consequence is, that any finder might demand payment, and against such liability to an unknown finder the maker should be indemnified. But the maker is subjected to no such risk in the case of a lost note payable to order and not negotiated; for if ever found, it cannot be negotiated by any one; not by the payee, for he has been paid; nor by a third party, for that would presuppose the commission of a forgery, which the law will not presume.

Another consideration to be borne in mind in this connection is, that the note in suit, being on demand, and the statutory period of sixty days (Rev. Laws, sec. 2013) having long since expired, is overdue, and any one into whose hands it might come, by finding or otherwise, would hold it subject to all the infirmities of such paper. He would take only the rights of his assignor, and could not be a *bona fide* purchaser.

We cannot see how the defendant will be subjected to any risk by the payment of this note, and so do not consider him entitled to indemnity; and as no other objection is urged to the law jurisdiction, we must hold that the action is well brought.

No question was made as to the plaintiff's right to recover on the item of book-account proved before the referee.

So that the judgment of the county court for plaintiff to recover both items named in the report, with interest on the same, and costs, is affirmed.

NEGOTIABLE INSTRUMENT, IF LOST, CANNOT BE RECOVERED ON AT LAW; the only remedy is in chancery: *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320; 81 Am. Dec. 603; *Moses v. Trice*, 21 Gratt. 556; 8 Am. Rep. 609. But see the notes to *Edwards v. McKee*, 13 Am. Dec. 480, and *Blade v. Nokand*, 27 Id. 128, 129, where the subject of actions on lost notes is fully discussed. In *Lamell v. Lamell*, 12 Vt. 443, 36 Am. Dec. 352, it is held that a lost note not negotiable, or not transferred if negotiable, is recoverable upon at law.

HUBBARD AND WIFE v. MANWELL.

[90 VERMONT, 285.]

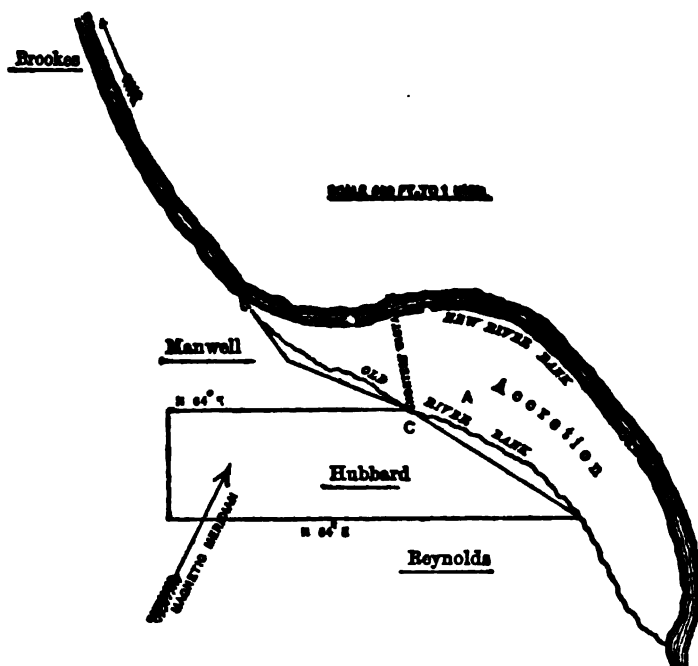
RULE FOR DISTRIBUTION OF ALLUVIAL ACCRETION FORMED ON LANDS BORDERING ON UNNAVIGABLE RIVER, owned by coterminous proprietors, is to extend the side lines of each owner to the nearest river bank, giving to each that part of the accretion formed in front of his own land.

TRESPASS on the freehold. The deed from Lyman and wife to Ballou, referred to in the opinion, was the deed through which the female plaintiff derived her title, through various intermediate conveyances, and the description in that deed was as follows: "Beginning at a stake standing on the bank of Onion (now Winoski) River, being the northeasterly or up-river corner of that part of said lot No. 80, which was heretofore owned by David Russell and Stephen Russell; thence south . . . ; thence north 59 deg. 30 min.; east 26 chains to the bank of Onion River; thence down said river, by the bank thereof, to the place of beginning, containing 14 ⁰⁰/₁₀₀ acres." The opinion will be understood by reference to the following diagram on the opposite page. Other facts are stated in the opinion.

Hard and Cushman, for the defendant.

Wales and Wales, for the plaintiffs.

ROYCE, C. J. This was an action of trespass *quare clausum*, in which the plaintiffs claim to recover for an entry upon land claimed by the female plaintiff, and the taking and carrying away timber growing thereon. The case was referred, and was heard upon the report made. The referee found that the parties were the owners of two tracts of land in Burlington, lying upon the bank of Winoski River. The plaintiffs'



land is situate above the land of the defendant, and extends along the river for about fifty rods, and the defendant's for about ninety rods. Since the parties acquired title to the above tracts of land, the entire river front of plaintiffs' and defendant's land had gradually and imperceptibly receded toward the north by deposits and accretions made thereon by the stream, until, at the time of the alleged trespass, extending the side line of the plaintiffs' land straight to the nearer river bank, the alluvion so formed in front of their land amounted to about five acres, and the alluvion so formed in front of the defendant's land amounted to about eight and a half acres. The trespass claimed to have been committed was upon the alluvion formed in front of the defendant's land.

The plaintiffs claim that their ownership of the alluvion is not confined to that formed in front of their land, but extends to and embraces a portion of that formed in front of the defendant's land, and that the alluvion should be divided between the parties by a line called "division by shortest distance," which is to be drawn from the point of intersection of Mrs. Hubbard's westerly line with the old bank of the river,

as described in the deed referred to in report from Lyman and wife to Ballou, "northwesterly to the nearest point on the present river bank perpendicularly to the thread of the stream, making an acute angle with said westerly bank, as defined in said deed; or if that line of division should not be considered the true and correct one, then said alluvion should be divided between the parties by a line called 'division by chord perpendiculars,' according to the rule laid down in *Emerson v. Taylor*, 9 Me. 44, 23 Am. Dec. 521, extending from said point of intersection nearly north to the present river bank, striking the same at a point about nineteen and three fourths rods up stream, or easterly from where said line called 'division by shortest distance' strikes the present river bank; or if neither of said lines of division should be adopted, then a line called 'division by proportional of old and new shore,' according to the rule adopted in *Deerfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276, dividing said accretion between the parties in proportion to the extent of their respective lines on the old river bank, should be adopted."

The defendant claimed that the true line of division of said alluvion was a line corresponding with the westerly line of Mrs. Hubbard's land, as described in said deed from Lyman and wife to Ballou; in other words, that the accretions formed along the river bank of plaintiffs' land belonged to them, and those formed in front of his own land to him.

And such we understand the general rule to be in the case of non-navigable streams: 3 Kent's Com. 428; Boone on Real Property, sec. 254.

Alluvion has been defined to be an addition to riparian land gradually and imperceptibly made by the water to which the land is contiguous, and to be an inherent and essential attribute to the original property, and is said to rest in the law of nature, and is analogous to the right of the owner of a tree to its fruits, and the owner of flocks and herds to their natural increase: *County of St. Clair v. Lovington*, 23 Wall. 46.

The owner takes the chances of injury and of benefit arising from the situation of his property. If there be a gradual loss, he must bear it; if a gradual gain, it is his.

All the cases cited in the briefs of counsel where a different rule from this natural and obvious one has been adopted, including those cases where either one of the rules contended for by the plaintiffs here has been applied, were either cases where, from their peculiar circumstances, some such method

of division seemed essential to a fair and just distribution between the riparian owners, or depended upon the fact that the lands in question bordered on a navigable stream, and derived a great part of their actual value from that circumstance, and from the benefit of the public easement: Per Shaw, C. J., in *Deerfield v. Arms, supra*.

The only case to which we have been referred where this court has been called upon to pass on a similar question was that of *Newton v. Eddy*, 23 Vt. 319, where the opinion was written by Judge Redfield, who dissented from the result arrived at by a majority of the court. It was decided upon its own peculiar circumstances, and with the express recognition on the part of the court of the fact that its decision would not be likely to establish any general rule, and with a confession from the dissenting judge that, for his part, he should have preferred the rule of the civil and common law.

All the authorities collected in defendant's brief agree in recognizing the fact that the law on this subject is very unsettled, and in confessing the impossibility of establishing a uniform rule which shall be calculated to meet the infinitely varying circumstances of cases that may arise, and to secure to the parties in every case a just and equitable distribution of alluvial lands. The object of all the cases, as defined by Shaw, C. J., in *Deerfield v. Arms, supra*, is, "to establish a rule of division among these proprietors which will do justice to each, where no positive rule is prescribed, and where we have no direct judicial decision to guide us."

With this consideration in view, and applying the principle announced at the outset in regard to the natural and inherent right of the owner of land, in the absence of any arbitrary rule on the subject, and when consistent with the rightful claims of others, to its accretions and increments, as he correspondingly runs the risk of loss, to ascertain what portion of the alluvion belonged to the plaintiffs, the side lines of their land should be extended to the nearest river bank; and adopting that rule, it will be seen that no portion of the land upon which the trespass is alleged to have been committed belonged to the plaintiffs. And no injustice or unfairness is wrought by this method of division. The defendant has lost by attrition about seven acres, situate on that portion of the river bank lying below said alluvial deposit. His total gain, therefore, is only about one and a half acres; while the plaintiffs have sustained no such loss to be offset against their gain. It can hardly be

claimed that these circumstances are such as to require a resort to any arbitrary rule for the purpose of working out a fair and equitable distribution. The "peculiar circumstances" governing the decision in so many of the cases cited in favor of the parties claiming the benefit of some such rule clearly do not exist here, and for that reason alone those cases could not be relied upon as authorities in this.

Judgment reversed.

A DIFFERENT RULE FROM THAT LAID DOWN IN THE PRINCIPAL CASE FOR APPORTIONMENT OF ALLUVIAL ACCRETIONS seems to have been adopted in most of the cases: See *Deerfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276, and *Kehr v. Snyder*, 114 Ill. 313, 55 Am. Rep. 866, and cases cited therein, where the rule was held to be that the accretion should be divided between the parties in proportion to the extent of their respective lines on the old river bank. See also note to *Hagan v. Campbell*, 33 Am. Dec. 276 et seq.

SELINAS v. VERMONT STATE AGRICULTURAL SOCIETY.

[60 VERMONT, 243.]

IT IS DUTY OF AGRICULTURAL SOCIETY TO RENDER REASONABLY SAFE TO ALL PERSONS lawfully in attendance the place in which it holds its public exhibitions. And it is a question of fact for the jury to determine whether such society is guilty of negligence in permitting, during its exhibition, a striking-machine to be used on its grounds, without a guard around it, whereby a person is injured. The court cannot assume, as matter of law, that such machine was not there by the society's permission. If it cannot be assumed that the machine was there by license, it is a question of fact whether it had been so long upon the ground that the society ought, in the exercise of reasonable care, to have known of its presence.

WHETHER PLAINTIFF HAS BEEN GUILTY OF CONTRIBUTORY NEGLIGENCE IS QUESTION OF FACT for the jury under proper instructions from the court.

CASE for negligence. There was a verdict and judgment for the plaintiff. Other facts are stated in the opinion.

Hard and Cushman, and Heath and Willard, for the defendants.

Pitkin and Huse, and T. R. Gordon, for the plaintiff.

TYLER, J. The plaintiff's evidence, upon which he rested his case, and upon which the defendants requested the court to direct a verdict in their favor, tended to show that the defendants, on September 8, 1884, and on the four succeeding days, held a joint agricultural and mechanical exhibition in Howard

Park in Burlington; that the plaintiff paid his entrance fee on the first day of the exhibition, and was rightfully upon the grounds; that there was placed upon the grounds, about ten rods from the superintendent's tent, and in nearly a direct line between the tent and Floral Hall, a striking-machine, consisting of a box from two and a half to three feet long, a foot and a half high, and about sixteen inches wide, and so contrived that a person striking with a mallet weighing eight or ten pounds could test his strength by means of a pointer or indicator arranged in the box; that the plaintiff was passing along by the usual route from the superintendent's tent towards Floral Hall, and when near the machine, and not observing it, some person suddenly took up the mallet, and in swinging it to strike a blow hit the plaintiff and broke his leg. It appeared that the accident occurred between two and three o'clock in the afternoon; that the machine was seen at that place by plaintiff's witnesses as early as twelve o'clock; and one witness was confident he saw it there between eight and nine o'clock in the morning.

The question presented by the plaintiff's evidence was, whether or not the defendants were guilty of negligence in suffering this machine, with no guard around it, to remain upon the grounds at this place, and at a time when visitors were constantly passing and repassing it. The court was requested to hold, as matter of law, that they were not.

Corporations are liable for their negligent torts, and for the negligence of their officers and servants acting in the course of their official duty or employment, in the same manner and to the same extent that individuals are liable under the same circumstances: *Morawitz on Corporations*, 2d ed., secs. 725, 734; *Boone on Corporations*, sec. 84.

As the defendants were holding a public exhibition in this park, and inviting visitors thereto, it was their duty to render it a reasonably safe place for all persons who might lawfully be there in attendance.

It was claimed in argument by defendants' counsel that as the machine was not placed there by the defendants, and its use was foreign to the purposes for which these societies were organized, it was a case of *ultra vires*, unless the defendants recognized the act as done in their business; that there was no evidence that defendants had any interest in the machine, or that it was there by their permission, or that it was being used with their knowledge. There was evidence, however,

that it was one of a kind of machines commonly exhibited at public gatherings of this kind, and that there were two or three of them on the grounds at this exhibition, and in about the same locality. The court could not assume, as matter of law, that these machines, as well as the peddlers' stands, victualing tents, and places of amusement were not there by the defendants' permission. If it were not to be assumed that the machine was there by license, it was a question of fact whether it had been so long upon the ground that the defendants ought, in the exercise of reasonable care, to have known of its presence. Whether it was dangerous or not depended upon its construction and the manner in which it was used. These were questions of fact, or at least mixed questions of law and fact, which could not properly have been decided by the court.

A remark made by Redfield, C. J., in *Vinton v. Schwab*, 82 Vt. 614, is applicable to this case: "But when there is no conflict in the testimony in regard to the particular facts, that will not always make it a mere question of law which the court may determine. If it still rests upon discretion, experience, and judgment, it is matter of fact, and not of law merely." It was said by Ross, J., in *Whitcomb v. Denio*, 52 Vt. 382: "Whatever may be the rule in other states in regard to its being the duty of the court, when the facts are undisputed, to determine as a matter of law whether a thing has been done within a reasonable time, or with reasonable care, diligence, or prudence, or to determine any other fact which involves the judgment of the trier upon an existing state of facts and circumstances, it has been the almost universal practice in this state, from the earliest recollection of the oldest members of the court and bar, to submit such question to the determination of the jury": *Fassett v. Roxbury*, 55 Id. 555. The only departure from this practice was in the often quoted case of *Briggs v. Taylor*, 28 Id. 180.

A case in point, as illustrative of the one under consideration, is *Laz v. Corporation of Darlington*, 81 Eng. Rep. 543, cited in plaintiff's brief. In that case the defendants were owners of a cattle market, and in the market-place they had erected a statue, around which they had placed a railing as a fence. The plaintiffs attended the market with their cattle, and occupied a particular site, for which they paid a toll. A cow belonging to them, in attempting to jump the railing, injured herself and died from the injuries. The jury found that

the railing was dangerous. The court held that the defendants, having received toll from the plaintiffs and invited them to the market with their cattle, were in duty bound to keep the market in a safe condition; and that an action would lie for the plaintiff's loss.

It is insisted by defendants' counsel that, to entitle the plaintiff to recover, it must appear affirmatively that he was in the exercise of at least ordinary care for his own protection; and that it did affirmatively appear that he was exercising no care at all, but on the contrary, was guilty of gross negligence.

To enable the plaintiff to make out a case, it was incumbent on him to show that the defendants were negligent in regard to this machine, and that no want of care on his part contributed to the happening of the accident. Not that he could testify, or that witnesses could testify, in his behalf that he was in the exercise of due care, but the burden was on him to produce such a state of the evidence as would enable the trier of the fact to say that the defendants were negligent and that his own conduct was prudent: *Walker v. Westfield*, 39 Vt. 246; *Bovee v. Danville*, 53 Id. 183.

The plaintiff's evidence shows the manner in which he was walking past this machine, not knowing of its existence. Whether he was in the exercise of that degree of care which the law requires, or whether he was guilty of contributory negligence, was a question of fact for the jury, under proper instructions from the court: *Hill v. New Haven*, 37 Vt. 501; 88 Am. Dec. 618.

The judgment of the county court affirmed.

OWNER OF PREMISES WHO INVITES PERSONS UPON THEM assumes an obligation that they are in safe condition: *Nichols v. Washington etc. R. R. Co.*, 83 Va. 99; 5 Am. St. Rep. 257, and note.

NEGLECTANCE IS A QUESTION FOR THE JURY, EXCEPT WHEN THERE IS NO CONFLICT IN THE TESTIMONY: *Indianapolis etc. R'y Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578; and the same rule applies in determining what is contributory negligence: *Seefeld v. Chicago etc. R. R. Co.*, 70 Wis. 216; 5 Am. St. Rep. 163, and note.

SHORO v. SHORO.

[60 VERMONT, 252.]

MARRIAGE PROCURED BY DURESS WILL BE ANNULLED, where the consent of the petitioner, a boy of sixteen years of age, is shown to have been extorted by bastardy proceedings against him, maliciously and without probable cause instigated and set on foot by the petitioness, an unchaste, pregnant woman of mature age.

PETITION to annul a marriage. The opinion states the case. *Ormsbee and Briggs*, for the petitioner.

Ross, J. This is a petition to have the marriage solemnized between the parties annulled, alleging, among other things, that the petitioner's consent was obtained by force and fraud. It comes to this court on the facts found by the county court, and the exceptions of the petitioner to the refusal of the county court to annul the marriage.

We have given the matter somewhat careful attention, both because the marriage contract is one in which the public generally is interested, and because no attorney has appeared for the petitioness.

The controlling facts found by the county court are, that the petitioner, a lad sixteen years old, never had sexual intercourse with the petitioness before or after the performance of the marriage ceremony, and never cohabited nor lived with her. She was older, of bad repute for chastity, and without probable cause maliciously caused him to be arrested upon bastardy proceedings. He was greatly frightened by the arrest, protested his innocence, but was told by the officer he must get bail or go to jail. He applied to his father to bail him, and was refused. The father told him to marry her, or go to jail, and advised him to marry her and not live with her. When protesting his innocence to the officer, the officer assured him that would not save him. He took his father's advice, went through the marriage ceremony performed by the magistrate who signed the warrant for his arrest, while under arrest, in the presence of the officer, and while greatly frightened, with the fixed intention of never living with her, which he has fully carried out. Can there be a doubt that the marriage ceremony was procured by duress? What is duress? Says Mr. Bishop (1 Marriage and Divorce, sec. 210): "Where a consent in form is brought about by force, menace, or duress,—a yielding of the lips, but not of the mind,—it is of no legal effect." Bacon's Abridgment, under the title

Duress: "If a man takes A. S. to wife by duress, though the marriage be solemnized *in facie ecclesie*, yet it is merely void, and they are not husband and wife; for without free consent there can be no marriage." Again he says: "It seems clearly agreed that where a person is illegally restrained of his liberty by being confined in the common jail, or elsewhere, and during such restraint enters into a bond or other security to the person who causes the restraint, he may avoid the same for duress or imprisonment." Mr. Bishop, in section 213, gives a case agreeing in its facts with the facts found by the county court in the case at bar, except the arrest was made without warrant, in which the marriage was annulled for duress. He intimates that if the arrest was on a legal process it would be otherwise. No doubt that would be true if by "legal process" he means one issued for legal cause. But as to the petitionee, the process on which she caused his arrest was a pretense, a fiction; because procured maliciously, and without probable cause. If anything, it was worse than an arrest without process, but claiming to have one. Mr. Bishop (sec. 212) says: "A doubt may be entertained whether a process would not be void, if shown to be both malicious and without probable cause." But illegal pretense, as it was, so far as regards the petitionee, it accomplished her wicked and unlawful purpose, frightened the boy, and caused him to consent to the performance of the marriage ceremony in form only,—a yielding of his lips, but not of his mind. *Sartwell v. Horton*, 28 Vt. 370, and *Hoyt v. Dewey*, 50 Id. 465, are full authority that money procured by a threatened arrest, on a charge which the maker knows to be false and without foundation in fact, may be recovered back. In *Sartwell v. Horton*, *supra*, the case of *Cadaval v. Collins*, 4 Ad. & E. 858, is cited with approval. The case and decision is stated as follows: "That was an action to recover money paid to the defendant after the plaintiff had been served with process. The fact was found by the jury that the defendant knew that he had no claim upon the plaintiff when he sued out his writ." Coleridge, J., observed that "no case has decided that when a fraudulent use has been made of legal process, both parties knowing throughout that the money claimed was not due, the party paying under such process is not to have the assistance of the law." Patterson, J., observed that "the jury concluded that the defendant knew that the debt did not exist, and that he used the process colorably. To say that money obtained

by such extortion cannot be recovered back would be monstrous." Much more monstrous, in our judgment, would it be to hold that a boy only sixteen years old, whose verbal consent to a marriage ceremony had been extorted by the use of a process known to be without probable cause, and used maliciously, instigated and set on foot by an unchaste, pregnant woman of mature age, cannot be relieved from the life-long bondage of such a wife.

The judgment of the county court is reversed, the pretended marriage annulled and vacated.

A MAN ARRESTED ON BASTARDY PROCEEDINGS CANNOT, though he marries to procure his discharge, have the marriage declared void as procured by duress: *State v. Davis*, 79 N. C. 603; *Johnson v. Johns*, 44 Tex. 40; but where the arrest was illegal, malicious, and without probable cause: *Soule v. Bonney*, 37 Me. 128; *Barton v. Morris*, 15 Ohio, 408.

FOSTER v. ADAMS.

[60 VERMONT, 392.]

SELLER MAY SUE AT ONCE, WHEN BUYER REFUSES TO GIVE NOTE payable on time with security, which he agreed to give; and no demand for the note and security is necessary where the seller requests the buyer to take the property and pay for it as agreed, and the latter refuses to do so.

ASSUMPSIT. The opinion states the case.

A. E. Cudworth, for the defendant.

W. W. Stickney, for the plaintiffs.

TYLER, J. The plaintiffs sold the engine and boiler in question to the defendant, on his agreement to give them his promissory note for eight hundred dollars, payable on time, and secured by mortgage on this and other property. After taking the engine to pieces and moving it about one hundred feet preparatory to its removal from Peru to Jamaica, the defendant decided not to take the property, and requested the plaintiffs to keep it, which they declined to do. The defendant notified the plaintiffs that he should not take the property, and they told him "they wanted he should take the engine and boiler, and pay for them as he agreed."

Ordinarily, when one party sells goods to another on a time of credit, he has no right of action for the price, either in general *assumpsit* or book-account, until the time has elapsed. Had the defendant in this case furnished the security, he

would have been entitled to the full terms of two and three years' credit before an action could have been maintained against him. The question is, whether his refusal to perform his part of the agreement, as stated in the referee's report, gave the plaintiffs a right to withdraw their credit and bring their action at once.

In the case of *Martin v. Fuller*, 16 Vt. 108, the sale and credit seem to have been absolute, and the time of credit and the security agreed upon an after-consideration. In *Ascutney Bank v. Ormsby*, 28 Id. 721, it was held that the neglect and refusal of the defendant to furnish the securities when requested prevented him from claiming the benefit of the stipulated credit; that the plaintiff had the right, on such a refusal, to commence his action immediately and recover the balance due. It was held in *Hale and Fish v. Jones*, 48 Id. 227, that when there was an agreement to give time for payment upon the debtor's giving a note with surety, if such note is not given, the creditor may sue at once in book-account or in general *assumpsit*.

It seems clear, upon the report, that the credit was not absolute, but conditional upon the defendant's giving a note secured by mortgage. As was said by Redfield, C. J., in *Rice v. Andrews*, 32 Vt. 691: "The security is the consideration for the credit, and when the one fails the other may lawfully be withdrawn." Doubtless, the cases of *Eddy v. Stafford*, 18 Id. 235, and *Hale and Fish v. Jones*, *supra*, are reconcilable upon this view.

In *Ascutney Bank v. Ormsby*, *supra*, the necessity of a demand for the agreed securities before action brought is recognized. We think, however, in this case that the defendant's refusal to take the property, and the plaintiffs' request that he should take it and pay for it as agreed, obviated the necessity of a formal demand for the note and mortgage before the action was commenced.

As the defendant had taken possession of the property, and the title thereto had vested in him, his refusal to give his notes therefor secured by mortgage, as promised, was a waiver of time in making his payments, and entitled the plaintiffs immediately to their action in general *assumpsit* for the price of the goods sold and delivered.

The judgment is affirmed.

VENDOR OF GOODS TO BE PAID FOR BY NOTE PAYABLE IN FUTURO, if such note is not given, may sue immediately for a breach of the special agreement, and recover the value of the goods as damages: *Hanna v. Mills*, 21 Wend. 90; 34 Am. Dec. 216, and note.

DREW v. EDMUNDS.

[60 VERMONT, 401.]

ACCEPTANCE OF OFFER WITHOUT OBJECTION OR CONDITION BINDS PARTY ACCEPTING, and the party making the offer has the right to understand that the acceptance was according to the terms of the offer.

AFFIRMATIONS OF VENDOR AS TO QUALITY OF ENGINE AND BOILER SOLD BY HIM CONSTITUTE WARRANTY that they are as described, when such affirmations are relied upon as the basis of the sale, and are so understood by the vendor.

DEFECT IN STEAM-CHEST IS NOT LATENT, where it is readily discoverable by taking off the cover.

PLAINTIFF WHO SUES TWO DEFENDANTS CANNOT DENY COUNTERCLAIM on the ground that it did not accrue to both, when he has always treated the deal as with both.

ASSUMPSIT. Plea, *non assumpsit*, and two pleas in set-off. The plaintiff had judgment for \$120, and the defendants on their plea in set-off had judgment for \$212.34, and judgment was entered for the defendants to recover of the plaintiff the balance, \$92.34. The referee found that the defendants bought of Drew and his partner Forsaith, since deceased, a steam-engine and boiler, upon a printed description thereof, given to them by the sellers, and other representations, which are stated in the opinion. Other facts appear from the opinion.

French and Southgate, for the plaintiff.

J. J. Wilson, for the defendants.

VEAZEY, J. When the plaintiffs got word that there was difficulty with the governor, they made a proposition to furnish another, with all the fittings, etc., and take back the old one, at a difference of forty-five dollars. The defendants accepted the offer without objection or condition. Whatever might have been the right of the defendants independent of this arrangement, we hold that having gone into it, they must stand by it. The plaintiffs had the right to understand, by the acceptance of their offer without notice of other claim, that the acceptance was according to the terms of the offer.

The plaintiffs are therefore entitled to recover the item of forty-five dollars, with interest thereon since April 1, 1881.

The plaintiffs insist that the defendants cannot maintain their claim in offset for several reasons: 1. That there was no warranty in the sale of the engine and boiler. The referee finds there was a warranty, and bases that finding on the statement in the printed slip (taken in connection with other findings) that the engine had been overhauled and put in

good working order, and was in good order, and complete in all its parts. It is further found that this description and representation constituted the basis of the purchase by the defendants, and were relied upon by them, as the plaintiffs well knew, and that they knew nothing about such property as to its value or quality, and had then had no experience in using it, and it did not appear that either of the defendants examined the engine and boiler before the purchase.

The findings are explicit that the defendant Edmunds, who made the purchase, told the plaintiffs that he had no knowledge of such property, and if he bought this engine and boiler he should rely upon the plaintiff's description of them; and that he also told the plaintiffs for what purpose he wanted them, which was the sawing of logs into lumber in a saw-mill. The plaintiffs were dealers in engines and boilers in Manchester, New Hampshire.

In *Hogins v. Plympton*, 11 Pick. 99, Shaw, C. J., said: "There is no doubt that, in a contract of sale, words of description are held to constitute a warranty that the articles sold are of the species and quality so described." Again, in *Wisor v. Lombard*, 18 Id. 60, the same learned judge said: "It is now held that, without express warranty or actual fraud, every person who sells goods of certain denomination or description undertakes, as part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the species, kind, and quality thus expressed in the contract of sale."

This doctrine has been reasserted in many cases in Massachusetts and elsewhere. In this state, in *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150, it was held that when the vendor's statements form the sole basis of the sale, his declarations are ordinarily to be regarded as a warranty.

The referee finds that the engine was not in good order and complete in all its parts, nor had it been put in good working order, according to the printed description. There was therefore the positive affirmation that the article had certain qualities which the referee finds it did not have, and this affirmation was relied upon as the basis of the sale, and was so understood by the vendors. In *Pasley v. Freeman*, 3 Term Rep. 57, Bul-
ler, J., referring to the early cases of *Cross v. Gardner*, Carth. 90, 8 Mod. 261, and *Medina v. Stoughton*, 1 Ld. Raym. 593, Salk. 220, said: "It was rightly held by Holt, C. J., and has been uniformly adopted ever since, that an affirmation at the

time of a sale is a warranty, provided it appear in evidence to have been so intended." In determining whether it was so intended, Benjamin, in his work on sales, section 613, says: "A decisive test is, whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty; in the latter, not."

In view of all the facts in the report, we think it impossible to predicate error in the conclusion of the referee that there was a warranty.

It is further claimed that the breach found by the referee is in respect to a latent defect. An express warranty covers a latent defect. But we do not think the defect in the steam-chest as found by the referee was a latent defect. It was readily discoverable, on taking off the cover, that the chest had been badly eaten by steam, and had been fixed up with red-lead or putty. It would seem that such a defect could not escape observation in overhauling an engine, as the plaintiffs said they had done. The defendants could not discover the defect, because not visible until the cover was removed, and they would have no occasion to take it off if in good order. They had the right to rely on the representation.

It is further claimed that the offset did not accrue to both defendants, and so must fall.

We see no good ground for severing the deal. It ran through several months, and the plaintiffs always treated it as a deal with both defendants, and made their writ and specifications against both. They are in no situation to deny a counterclaim in the lawsuit in behalf of both.

Judgment reversed, and judgment for the defendants for \$28.44, without costs.

REPRESENTATIONS BY VENDOR UPON WHICH HE INTENDS THAT VENDEE SHALL RELY, and upon which the latter does rely in making a purchase, amount to a warranty: *Hahn v. Doolittle*, 18 Wis. 196; 86 Am. Dec. 757; and see *Ellis v. Andrews*, 56 N.Y. 83; 15 Am. Rep. 382-386, note.

PATENT AND LATENT DEFECTS IN ARTICLE SOLD: See *Roberts v. Jenkins*, 21 N. H. 116; 53 Am. Dec. 178, note. In *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804, it was held, on the sale of a churn, represented as a juniper-wood churn with nickel-plated dasher, and which proved to be made of painted pine with polished iron dasher, that the defects were not so patent as to avoid the warranty.

PALMER v. VILLAGE OF ST. ALBANS.

[80 VERMONT, 427.]

LAW DOES NOT IMPUTE TO ONE MAN NEGLIGENCE OF ANOTHER unless the relation of master and servant exists between them. To charge one man with the negligence of another, it is not sufficient to show that the latter was, at the time, acting under the employment of the former, but it must be shown that such employment created between them the relation of master and servant.

MUNICIPAL CORPORATION IS NOT LIABLE FOR INJURIES RESULTING FROM NEGLIGENCE OF ITS EMPLOYEE in piling tiles at the direction of its street commissioner in the corporation yard, when the corporation neither owned the tiles, nor had the custody or control of them; but the commissioner, taking advantage of his official position, was acting, as to the tiles, not as the servant of the corporation, but as an individual for his private gain, the act of piling the tiles not amounting to a nuisance, and no public trust being involved. And in an action against such corporation to recover for such injuries, parol evidence is admissible to prove that it neither owned nor controlled the tiles, although they had been shipped to it, and a bill of them had been rendered to it, and allowed by the president of its board of trustees.

OCCUPANT OF REALTY IS NOT LIABLE FOR INJURIES RESULTING FROM NEGLIGENT USE OF PERSONAL PROPERTY ON IT, when such personal property is neither owned nor controlled by him, unless such use amounts to a nuisance.

CAUSE WILL NOT BE REMANDED TO REFEREE FOR REVISION OF HIS FINDINGS as to a certain point, which, it is alleged, was not regarded as very important by counsel, nor given much prominence on the trial, when the record shows that the point was brought to the attention of the referee by both sides, and discussed by the court below.

CASE for negligence. There was judgment on the report of the referee for damages. The referee found that the defendant was a municipal corporation duly organized; that, at the time of the injury complained of, one Mason was its duly appointed street commissioner; that the corporation was the lessee of a corporation yard adjoining premises occupied by the plaintiffs; that employees of the corporation negligently piled a quantity of tiles against the fence between the corporation yard and the plaintiffs' lot, causing the fence to fall upon the female plaintiff, thereby inflicting upon her severe bodily injury, there being no contributory negligence on her part. The defendant offered evidence tending to prove that the tiles were, at the time of the injury, the property of Ripley Sons, and were in the custody and control of said Mason as an individual, and not in his official capacity. The referee admitted this evidence, subject to plaintiffs' objection, and found that, if said evidence was properly admitted, it showed that, at the time of the accident, the tiles were not the prop-

erty of the corporation, and were not in the custody and control of it or of its servants or employees, as such. The exhibits mentioned in the opinion were bills of drain pipe presented to the village of St. Albans by Ripley Sons, and marked "allowed" by the president of the board of trustees. Other facts are stated in the opinion.

Wilson and Hall, and Cross and Start, for the defendant.

M. Buck and Son, for the plaintiffs.

ROWELL, J. The defendant offered evidence tending to show that before and at the time in question the tiles were the property of Ripley Sons, and in the custody and control of Mason as an individual, and not as water superintendent nor street commissioner, both of which offices he had for a long time and then held. The plaintiffs objected to the admission of this evidence, for that it was not competent to show such facts. But the referee admitted it, and found therefrom certain facts which he details, and from those facts alone he finds that the tiles in the corporation yard on the day of the accident were not, when piled there the fall before, nor thence until after the accident, the property of the village, nor in its custody or control, nor in the custody or control of its servants or employees as such.

It was competent to show what it is said the evidence tended to prove, unless it is to be said that the village is liable any way, because the tiles were on its land, and in its apparent custody and control. But such is not the rule in respect of real estate, as we shall see, unless the act complained of is a nuisance in itself, or, perhaps, a public trust is involved, neither of which elements is present here.

It is not claimed that the evidence did not tend to show the facts found from it, but that the finding from those facts is unwarranted. And here the question is, Do those facts tend to support the finding? If they do, the finding must stand. It is true, as argued, that many of them tend strongly against the finding, and to show that the custody and responsible control of the tiles were in the village in fact as well as in appearance, and for its own purposes and business; but it is also true that some of them tend to show the contrary, and to support the finding, and so it must stand, and the case be decided from that standpoint; for we do not think, as argued by Mr. Buck, that the exhibits referred to preclude parol evidence

of ownership, nor that the defendant is estopped to deny its custody of the tiles.

It is contended that the rule laid down in *Joel v. Morison*, 6 Car. & P. 501, governs this case. There the defendant's servant, in going from one place to another with his master's team on his master's business, drove *extra viam* for some purpose of his own, and while thus driving negligently ran against and injured the plaintiff; and it was held that if the servant was going out of his way against his master's implied command when driving on his master's business, he made his master liable; but if he was going on a frolic of his own, without being at all on his master's business, that the master was not liable. The law is here most properly laid down, as said in *Sleath v. Wilson*, 9 Car. & P. 607, where it is said to be quite clear that if a servant, without his master's knowledge, takes his carriage out of the coach-house, and with it commits an injury, the master is not liable, and on the ground that he has not intrusted the servant with the carriage; but that, when the master has intrusted the servant with the carriage, it is no answer to say that the servant acted improperly in its management, for if so, it might be claimed that if the master directs his servant to drive slowly, but he disobeys and drives fast, and thereby negligently causes an injury, the master is not liable, which is not the law, for in such case the master is liable, because, by intrusting the servant with the carriage, he has put it in his power to mismanage it.

Quinn v. Power, 87 N. Y. 535, 41 Am. Rep. 392, is much to the same point. There the defendant owned a ferry-boat running across the Hudson between two points. One day when the boat was making a regular trip, the pilot in charge took on a boatman as matter of favor, and agreed to put him on board his boat, which was part of a tow passing up the river. The ferry-boat diverged from its course to reach the tow, and through the negligence of those in charge collided with a canal-boat attached to the tow, whereby the plaintiff's intestate was thrown into the river and drowned; and the defendant was held liable. In discussing the case, the court says: "When this ferry-boat left the dock at Athens, it started for its terminus at Hudson. It took freight and passengers to transfer across the river. Servants and boat, as the latter moved out into the river, were doing the master's business, and acting both in the line of duty and employment. There was a usual track or route by which the boat crossed. It may

even have been selected and directed by the owner. In deviating from it, the servants might disregard the instructions of the master, but they were none the less engaged in the master's business of transporting freight and passengers from one point to the other because they did not follow the usual route or pursued another or even a forbidden track. They were still doing their master's business, though in a manner contrary to his instructions. If they stopped the boat in the middle of the river, they did not cease to be engaged in the master's business. Even if the motive was some purpose of their own, they were still about their usual employment, although pursuing it in a way to subserve their own purpose also. When they took this passenger to the tow, and in so doing deviated from the usual course, and stopped the boat mid-river for that reason, they were still engaged in the master's business of transporting freight and passengers across the river. They were doing it in a way not authorized, perhaps, and possibly in some sense to effect a purpose of their own; but they were none the less acting within the scope of their employment, and engaged in their master's business." This reasoning brings out clearly both the rule and its application.

The rule of *respondeat superior* is of universal application whether the act be one of omission or of commission, whether negligent or fraudulent. And it makes no difference that the master did not know of the act, or disapproved it, or even forbade it, provided the servant was acting at the time for the master and within the scope of the business intrusted to him: *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468; *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597; *Quinn v. Power*, 87 N. Y. 535.

But the foundation of the rule is the relation of master and servant. When that does not exist, the law does not impute to one man the negligence of another: *Hexamer v. Webb*, 101 N. Y. 377; 54 Am. Rep. 703; *Quarman v. Burnett*, 6 Mees. & W. 499. Hence, the modern cases all show that it is not enough, in order to charge one man with the negligence of another, to show that the latter was acting at the time under the employment of the former; but you must go further, and show that the employment created the relation of master and servant between them: *Hilliard v. Richardson*, 3 Gray, 340; 63 Am. Dec. 743, where the cases are collated and commented upon.

Now, testing this case by the rule invoked for its govern-

ment, we regard the finding that the tiles were not the property of the village, nor in its custody or control, as perfectly fatal to the plaintiff's right of recovery, as it absolutely negatives the existence of the relation of master and servant between the village and Mason or any other of its employees in respect of the tiles, and precludes the considerations urged upon us to show the contrary. Although Mason and the others who handled and piled the tiles were at the time the employees of the village, yet they were not its servants as to them, for it was not the business of the village, nor a matter in which it had any property, nor over which he had any control; but it was a frolic of Mason's own, in which he seems to have taken advantage of his official position for the purpose of private gain.

Nor do we see any other ground on which the plaintiffs can stand.

It has sometimes been said that there is a distinction in this respect between fixed and movable property, and that one in the possession of the former must take care that it is not so used as to injure others, and this, whether it be used by his own immediate servants or by contractors or their servants; that injuries done upon such property are in the nature of nuisances, for which the occupant ought to be held chargeable when occasioned by those whom he brings upon it; that the law confines its use to him, and he should take care not to bring persons upon it who do mischief to others. This distinction is adverted to in *Laugher v. Painter*, 5 Barn. & C. 547; *Mayor etc. of New York v. Bailey*, 2 Denio, 433; and noticed in *Quarman v. Burnett*, 6 Mees. & W. 499. But on full consideration in *Hobbit v. London etc. R. R. Co.*, 4 Ex. 254, it was held that there is no such distinction except when the act complained of is such as to amount to a nuisance. And this is undoubtedly the present view. But possibly we should add to the exception cases involving a public trust, as intimated in *Hilliard v. Richardson*, 3 Gray, 349, 364; 63 Am. Dec. 743.

The result is, that the judgment below is reversed, and judgment on the report for the defendant.

The petition for a new trial, preferred by the defendant, has no foundation, and is dismissed with costs.

And now before entry of judgment, the plaintiffs move that the judgment below be reversed *pro forma*, and the cause remanded, to the end that the report may be recommitted to the referee for him to revise his finding in respect of the owner-

ship, custody, and control of the tiles, because, it is said, that point was not regarded by plaintiff's counsel as very material, and was not given much prominence before the referee; and counsel think that the finding of the referee is so manifestly wrong that on further hearing and full argument, even without more testimony, it is very certain he would change it.

When this case was here on exceptions to the directing of a verdict for the defendant, — 56 Vt. 519, — a prominent question was, whether there was evidence tending to show that the village had the custody and control of the tiles; and it was held that there was, and that if it had, their ownership was immaterial. It also appears from papers now handed up that the point was brought to the attention of the referee by both sides, as well in requests for findings as in the briefs of counsel. It also appears from briefs used before the county court that the matter was discussed there.

In these circumstances, we know of no practice that will warrant the granting of this motion. It amounts to asking for a new trial for the purpose of experimenting with the referee for a different result.

WHEN ACT OF INCUMBENT OF OFFICE IS TO BE REGARDED AS AN OFFICIAL ACT, AND WHEN NOT. — It is often difficult to determine whether an act done by an incumbent of an office is an official or a mere private act. Acts of an officer which have no connection with the duties of his office are, of course, purely private acts, and no more official acts than the same acts would be if done by a person in a private station: *State v. Conover*, 28 N. J. L. 224; 78 Am. Dec. 54; *Sooy v. State*, 39 N. J. L. 135; *Mayor v. Mummy*, 33 Mich. 61; 33 Am. Rep. 670; *State v. Coon*, 14 Minn. 456. There can be no difficulty in determining that such acts are private. The difficulty arises in cases where the acts relate to matters with which the officer has to do as an officer, and which he does, or undertakes to do, *colore officii*. In reference to such acts, it seems to be a general rule, that to make them official acts, it must be shown that they were legally authorized, and that they were such acts as could be so authorized. Thus it is held that a municipal corporation is not liable for unauthorized and unlawful acts of its officers, although done *colore officii*: *Thayer v. Boston*, 19 Pick. 511; 31 Am. Dec. 157. Shaw, C. J., in delivering the opinion in that case, said: "As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*; it must further appear that they were expressly authorized to do the acts by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city, on the subject to which they relate": See also *Morrison v. City of Lawrence*, 98 Mass. 219. In *Boom v. City of Utica*, 2 Barb. 104, it was decided that a municipal corporation is liable for a tortious act committed by its agent pursuant to its directions in relation to matters within the scope of the objects of its incorporation; but not for any unauthorized acts of its officers, though done *colore officii*. In that case it was held that the city of Utica was not liable for the

act of one of its aldermen in taking possession of the house and lot of the plaintiff for the purpose of placing in the house a person afflicted with the small-pox. And in *Revolving Scraper Co. v. Tuttle*, 61 Iowa, 423, 47 Am. Rep. 816, it was held that an order for goods signed by township trustees, with the addition of their official description, but purporting in the body thereof to be their personal contract, the contract not being such as the township could legally make, bound the trustees individually. In *Hodges v. City of Buffalo*, 2 Denio, 110, it was held that a municipal corporation has no power to provide entertainments on any occasion whatever, and that the city was not, therefore, liable for an amount subscribed by the city council for the purpose of providing an entertainment on the occasion of a Fourth of July celebration. The foregoing are cases in which it was sought to hold the corporation liable for the acts of its officers. In cases where the question to be determined is, whether or not the act of the officer amounts to a misconduct or misbehavior in office, the rule seems to be less strict. Thus in *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172, it was held that misconduct in office is not limited to such acts as the law requires or expressly authorizes the officer to perform. In that case the defendant, a register of deeds, over his official signature, knowingly, purposely, and designedly made and delivered to another a certificate that he had examined the title of an individual therein named to a certain lot of land, and found no encumbrance thereon, when he well knew that the registry contained the record of an encumbrance by attachment thereon, and that the certificate was false. It was held that he was guilty of misconduct in office, although it was no part of his official duty to make such an examination, or to issue such certificates. And in *State v. Wedge*, 24 Minn. 120, it was decided that an officer who corruptly does an act beyond his authority, assuming to act officially and under his official designation in such a manner as is likely to deceive and mislead others, is guilty of misbehavior in office. In that case the defendant, who was county attorney, indorsed on the bond of a person under arrest on a criminal charge his approval of the bond, and a direction that the officer in charge of the prisoner should release him upon receipt of the bond. This indorsement he signed as county attorney, although such approval and direction for release were beyond his official authority. It was held that he was guilty of misbehavior in office. But in *State v. Coon*, 14 Id. 456, it was held that a justice of the peace was not guilty of misbehavior in office, in advising a suitor to sell a judgment which he had recovered in his court. Gilfillan, C. J., who delivered the opinion in that case, said: "The defendant could not, in his official character, advise Klein to sell the judgment. It is not his official duty to give any advice on such matters. A party has no right to ask it, nor rely upon it, except as he would ask the advice of a private person."

The question under consideration most frequently arises in actions on the official bonds of sheriffs and constables. Sureties on such bonds are liable only for acts done in an official capacity, and in actions against them it is material to determine whether the acts for which it is sought to hold them liable were official acts or private ones. A few cases hold that where a sheriff or constable seizes and sells the property of one man under an execution against the property of another, his act is not an official act, but a mere personal trespass: *Ex parte Reed*, 4 Hill, 672; *State v. Conover*, 28 N. J. L. 224; 78 Am. Dec. 54; *State v. Brown*, 11 Ired. 141; *Eaton v. Kelly*, 72 N. C. 110; *Taylor v. Parker*, 43 Wis. 78.

But the great preponderance of authority is in favor of the doctrine that the act of a sheriff in seizing and selling the property of one person under an

execution against that of another is an official act: *Murfree on Official Bonds*, sec. 476; *Achworth v. Kempe*, 1 Doug. 40; *United States v. Hine*, 1 McAr. 27; *Van Pelt v. Littler*, 14 Cal. 194; *Walah v. People*, 6 Ill. App. 204; *Commonwealth v. Stockton*, 5 T. B. Mon. 193; *Archer v. Noble*, 3 Mo. 418; *Harris v. Hanson*, 11 Id. 241; *Lowell v. Parker*, 10 Met. 309; *Greenfield v. Wilson*, 13 Gray, 384; *Tracy v. Goodwin*, 5 Allen, 409; *People v. Schuyler*, 4 N. Y. 173, overruling *Ex parte Reed*, 4 Hill, 572; *Rogers v. Weir*, 34 N. Y. 465; *Cummings v. Brown*, 43 Id. 514; *Mayor v. Ryan*, 7 Daly, 426; *Mayor v. Doody*, 4 Abb. Pr. 127; *Dennison v. Plumb*, 18 Barb. 89; *Ball v. Pratt*, 36 Id. 402; *State v. Jennings*, 4 Ohio St. 418; *Carmack v. Commonwealth*, 5 Binn. 184; *Holliman v. Carroll*, 27 Tex. 23; 84 Am. Dec. 606; and see the note to *Commonwealth v. Cole*, 46 Id. 513-517, where the liability of sureties on the official bonds of sheriffs is discussed at length.

The act of a deputy sheriff in levying execution for the purpose of collecting it is an official, and not a personal, act: *Pond v. Lemay*, 45 Barb. 152. So is the act of a sheriff who, after levying on property under an execution, permits the defendant to remove and dispose of it so as to deprive the plaintiff of his debt: *Commonwealth v. Hurt*, 4 Bush, 64. The act of an officer in seizing and selling property exempt from execution is an official act for which his sureties are liable: *McElhaney v. Gilleland*, 30 Ala. 183; *Strunk v. Ocheltree*, 11 Iowa, 158; *State v. Moore*, 19 Mo. 369; *State v. Farmer*, 21 Id. 160. In Missouri, a sheriff appointed by the court to act in lieu of a trustee is deemed to be acting officially, and his bondsmen are liable for his acts in that capacity: *Tatum v. Holliday*, 59 Id. 422; *State v. Griffith*, 63 Id. 545; *State v. Taylor*, 6 Mo. App. 277. And in Louisiana a sheriff acting as the syndic of an insolvent estate is regarded as acting in his official capacity: *Succession of David*, 14 La. Ann. 730. The act of a sheriff in taking prisoners to the state prison or patients to an insane asylum is an official act, and is none the less so because a part of it must be performed without the limits of his county: *Adams v. San Francisco*, 50 Cal. 117. The act of an officer who seizes and sells property without any writ, or under an execution that is *functus officio*, is not an official act, and his sureties are not liable therefor: *Turner v. Collier*, 4 Heisk. 89; *Holliman v. Carroll*, 27 Tex. 23; 84 Am. Dec. 606; *State v. Mann*, 21 Wis. 684; *Gerber v. Ackley*, 32 Id. 233; 37 Id. 43; 19 Am. Rep. 751. A sheriff receiving money on an execution after the return day has passed is not acting officially: *Dean v. Governor*, 13 Ala. 526; *Finspatrick v. Branch Bank*, 14 Id. 533; *Thomas v. Browder*, 33 Tex. 783. But in receiving money from the sale of property sold after the return day, which had been levied upon before the return day, he acts officially: *Evans v. Governor*, 18 Ala. 659; 54 Am. Dec. 172; *Dennis v. Chapman*, 19 Ala. 29; 54 Am. Dec. 186.

Where a sheriff sells attached property pursuant to an agreement between the plaintiff and defendant, or between the plaintiff and the sheriff, he acts, not in his official capacity, but as a mere agent of the parties: *Governor v. Perrine*, 23 Ala. 807; *Schloss v. White*, 16 Cal. 65. The act of a constable, who, in executing a distress warrant, breaks open a window and enters the same by force and arms, curses and abuses the family, and assaults the plaintiff's mother, a boarder in the house, by presenting at her a pistol, within shooting distance, and threatening to shoot her, is not an official act, but a personal trespass, for which he alone is liable: *Jewell v. Mills*, 3 Bush, 62. A sheriff who, by order of court, loans out money in his hands, derived from the sale of attached property, does not act officially in the matter, but under a personal trust: *Sanders v. Parrott*, 1 Duvall, 292. A sheriff in Kentucky is liable to account for fee bills which he collects, but the collection of

such bills is not an official duty for which his sureties are liable: *Griffith v. Commonwealth*, 10 Bush, 281. A sheriff, in giving an unauthorized guaranty of title to property sold by him, is not acting officially: *Ball v. Pratt*, 36 Barb. 402. Where a deputy sheriff takes from the plaintiff instructions outside of the line of his duty as deputy, and acts upon them, his acts are personal, and not official, in their character: *Pond v. Leman*, 45 Barb. 152; *Rollins v. State*, 13 Mo. 437; 53 Am. Dec. 153. Where a constable, having collected money on an execution, informs the plaintiff that the money is ready for him, but the plaintiff tells him that he has no use for it, and that the constable may use it if he wishes to do so, the act of the constable in retaining and using the money is not an official act for which his sureties are liable: *Hill v. Kemble*, 9 Cal. 71. In New York and in Wisconsin it seems to be held that what would be an act of official misconduct in the case of a sheriff would not necessarily amount to a breach of the condition of a constable's bond, required by their statutes: *Taylor v. Parker*, 43 Wis. 78; *People v. Lucas*, 93 N. Y. 585. In the latter case, the wrongful seizure and sale by a constable of the property of one person under an execution against another were held not to constitute a breach of the conditions of his official bond prescribed by the revised statutes, which were, to pay to the persons entitled thereto "all such sums of money as the said constable may become liable to pay on account of any execution which shall be delivered to him for collection." The court distinguished the case from that of *People v. Schuyler*, 4 Id. 173, on the ground of the difference between the conditions of the sheriff's official bond and those of the constable's bond.

TO ESTABLISH LIABILITY OF ONE PERSON FOR NEGLIGENCE OF ANOTHER, relation of master and servant must be shown to exist between them: *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49; *King v. New York etc. R. R. Co.*, 66 N. Y. 181; 23 Am. Rep. 37; *Hexamer v. Webb*, 101 N. Y. 377; 54 Am. Rep. 705.

ROBERTS v. ATHERTON.

[80 VERMONT, 562.]

DISCHARGE UNDER STATE INSOLVENT LAW IS NO BAR TO RECOVERY ON NOTE owned by one who, when the discharge was granted, was a citizen of another state, and in no way became a party to the insolvency proceedings, although the note was executed in the former state, and both parties thereto were, at the date of its execution, citizens of that state.

ASSUMPT. The opinion states the case.

J. J. Monahan and L. F. Wilbur, for the defendant.

M. H. Alexander, for the plaintiff.

ROSS, J. The note on which recovery is sought was given in this state to the plaintiff, then a resident of the state, by the defendant, then also a citizen and resident of the state.

The plaintiff removed from the state. Subsequently the

defendant was adjudged an insolvent, and by due course of proceedings received a discharge in the court of insolvency. The plaintiff in no way became a party to the proceedings in the court of insolvency in which the defendant obtained his discharge. The single question presented by the exceptions is, Did the discharge thus procured by the defendant discharge the debt due the plaintiff evidenced by the note? We think it is clear that it did not. It is now fully established by the decisions of the United States supreme court, and of most of the state courts of last resort, that state insolvent laws can have no jurisdiction beyond the limits of the state in and for which they were enacted, and that if the debt is of such a character that it follows the person of the creditor, no matter where made, or where to be paid, to give a state insolvent court jurisdiction of the debt it must have jurisdiction of the owner of the debt. At one time it was held by the supreme court of Massachusetts that if the debt were created and to be discharged in that state, the state insolvent court had jurisdiction to discharge the debt notwithstanding its *situs* was with the person of the owner, and the owner did not reside in the state, and did not take any part in the proceedings which resulted in granting the discharge. This doctrine was expressly denied by the United States supreme court in *Baldwin v. Hale*, 1 Wall. 223; and it was held that to discharge such a debt, it was necessary that the court of insolvency should obtain jurisdiction of the owner of the debt, which could be obtained only when he resided in the state, or submitted to its jurisdiction by proving his debt, or otherwise becoming a party to the proceedings. That case arose in the state of Massachusetts, and was taken to the United States supreme court from United States circuit court of that state. This decision has been generally followed, and has been substantially followed in this state in *Bedell and Warden v. Scruton*, 54 Vt. 493; *McDougal and Young v. Page*, 55 Id. 187; 45 Am. Rep. 602. See also other cases cited by plaintiff's council. The statute (Rev. Laws, sec. 1856) cannot be given force beyond the jurisdiction which the court obtained over the plaintiff at the time the petition was filed. It then had and could have no jurisdiction over the plaintiff. He was then a resident and citizen of another jurisdiction. He did not in any way submit to the jurisdiction of the court.

The judgment of the county court is affirmed.

EFFECT OF FOREIGN DISCHARGE IN INSOLVENCY: See note to *Peck v. Hubbard*, 62 Am. Dec. 611-613. It seems to be the rule that in order to be affected by a discharge in insolvency the person to be affected must have been a party to the proceedings, or must have been brought in some manner within the jurisdiction of the insolvency court: *McDougal v. Page*, 55 Vt. 187; 45 Am. Rep. 602; and see *Stoddard v. Harrington*, 100 Mass. 87; 97 Am. Dec. 80.

MALANEY v. TAFT.

[60 VERMONT, 571.]

BAILER OF HORSE FOR HIRE IS LIABLE IN ACTION FOR TROVER, when he hires him to be driven to one place and drives him to a different one, without the consent of the owner.

BURDEN OF PROOF OF NEGLIGENCE IS ON PLAINTIFF in an action on the case for negligence against the bailee of a horse for hire, and is not shifted by merely showing that the horse was sound when delivered to the bailee, and when returned was injured in a way that does not ordinarily occur without negligence.

CASE for negligence in improperly using and immoderately driving the plaintiffs' horse. The first and third requests asked by the plaintiffs and refused by the court are as follows: "1. That if the jury find that defendant used said horse for a different purpose or to perform a longer journey than that for which it was hired, then the defendant takes upon himself the risk of all accidents or disabilities which may befall the property hired, and must make all damages good to the plaintiffs." "3. If the jury find that the defendant drove said horse beyond the limits of the bailment, this fact alone renders him liable for all damages sustained by the plaintiffs." There was a verdict for the defendant. Other facts are stated in the opinion.

M. H. Alexander and L. F. Wilbur, for the plaintiffs.

S. H. Davis, for the defendant.

TAFT, J. There are two questions in this case:—

1. The plaintiffs claimed, on trial, that they let the horse to be driven from Jericho to Hinesburgh and return; that the defendant, at Richmond, a point on the route, left the route and drove from Richmond to Huntington and back to Richmond. If the evidence satisfied the jury of this fact, and that he did so without the consent of the plaintiffs, the defendant might have been liable in an action for trover: *Hart v. Skinner*, 16 Vt. 138; *Towne v. Wiley*, 23 Id. 355; 56 Am. Dec. 85.

But this action is a case for improperly caring for and ill treating the horse. For all damages arising from such acts and neglects, wherever the horse was driven, the charge permitted a recovery. The plaintiffs, therefore, had an opportunity to recover all damages declared for. There was no error in the action of the court upon the first and third requests.

2. The second request of the plaintiffs to charge was, "that when property in the exclusive possession of the bailee for hire is injured in a way that does not ordinarily occur without negligence, as the plaintiffs' evidence tends to show in this case, then the burden of proof is upon the bailee to show that it was not occasioned by his negligence."

It is conceded by the plaintiffs that the burden of proof in the first instance was upon them; that it was incumbent upon them to show that the injuries to the horse were occasioned by the negligence of the defendant; but they insist that they discharged that duty and relieved themselves of that burden by showing that the horse was delivered to the defendant in a sound condition, and returned injured in a way that does not ordinarily occur without negligence. That having shown these facts, the burden shifted and rested upon the bailee to show that the injury was not occasioned by his negligence. Whether they were entitled to have this request complied with depended upon the duty of the defendant in respect to the horse. The request may embody sound law had it been the defendant's duty to return the horse in the same condition in which he received it; but his duty was performed if, during the bailment, he had exercised due care, and had been guilty of no neglect in his treatment of the horse. Had he been free from fault, he was not liable, although he might not have returned the horse at all. This being the measure of his duty, the burden was upon the plaintiffs to show negligence, and rested upon them throughout the trial. The plaintiffs do not establish negligence by showing the facts stated in the request; the facts may have been true, and the defendant guiltless of any improper conduct in respect to the horse; the injuries may have arisen from some cause wholly disconnected with the care or use of the horse. However potent the facts tending to establish the defendant's guilt may be, there is no time during the trial that the plaintiffs are entitled to have them withdrawn from the consideration of the jury and a verdict ordered, upon a simple showing that the horse when returned was not in the condition it was in at the time of the bailment, as stated

in the request. This case should be distinguished from those where the defendant is under an obligation to return or deliver property in the condition that it was in when he received it. In suits against common carriers, innkeepers, and perhaps some others, a different rule may apply.

The cases mainly relied upon by the plaintiffs do not aid them. *Collins v. Bennett*, 46 N. Y. 490, was an action of trover, and a conversion of the horse, as the court said, "was clearly proved, and no question could therefore arise as to the burden of proof." The discussion by Peckham, J., of a question which he says was not in the case, is not law. The cases cited by him in support of his views are mainly those against common carriers and innkeepers. *Logan v. Mathews*, 6 Pa. St. 417, is a case very similar to this in its facts; but the instructions of the trial court which were sustained were: "When the bailee returned the property in a damaged condition, and fails, either at the time or subsequently, to give any account of the matter in order to explain how it occurred, the law will authorize the presumption of negligence on his part. But when he gives an account, although it may be a general one, of the cause, and shows the occasion of the injury, it then devolves on the plaintiff to prove negligence, unskillfulness, or misconduct." We by no means concede this charge to be law, but if it is, the plaintiffs' case is not within it, as it does not appear that the defendant failed to give an account of his expedition, and "his testimony tended to deny and disprove every claim and contention of plaintiffs tending to fix any liability upon him," in which contingency, as the rule is laid down in that case, it devolved on the plaintiffs to show negligence.

Neither is the case cited of *Rowell v. Fuller*, 59 Vt. 688, in point. That action was *assumpsit* to enforce a contract obligation to return notes on demand; if the defendant did not fulfill his contract, and failed to return the notes, he was liable, and the burden was upon him to show the cause of his failure, if he wished to be relieved from it. We understand our ruling upon this question has always been the doctrine of the English courts, applied in some instances to common carriers. *Cooper v. Barton*, 3 Camp. 5, note, "was an action of *assumpsit* for not taking proper care of a horse hired by defendant of plaintiff. The plaintiff proved the hiring of the horse; that he was returned to him with his knees broken in consequence of a fall, whilst used by the defendant; and that the horse had

before that time been often let out to hire, and had never fallen down. The plaintiff contended that this was a sufficient case to go to the jury, although he had given no evidence of negligence; because as he had shown that the horse was a good horse, and not in the habit of falling, it must be presumed that the fall was occasioned by negligence, and it was for the defendant to prove the contrary if he could. Le Blanc, J., however, said that the plaintiff must give some evidence of negligence; and as he had given none in this case, the plaintiff must be nonsuited."

The same rule applies in case of a warehouseman whose duty it is to keep goods intrusted to him with due care: *Willett v. Rich*, 142 Mass. 356; 56 Am. Rep. 684.

Bearing in mind the liability of the bailee in a case like the one at bar, there need be no difficulty in arriving at a correct result, and reconciling the cases that apparently are in conflict.

Judgment affirmed.

BAILER OF HORSE FOR HIRE IS GUILTY OF CONVERSION, in driving him to place different from that for which he was hired: See *Towne v. Wiley*, 23 Vt. 355; 56 Am. Dec. 85, and note.

BAILER IS PRESUMED TO HAVE BEEN NEGLIGENT, and burden of showing contrary is on him, where the bailor shows that he delivered and the bailee received the property in good condition, and that it was returned in a damaged state: *Cumins v. Wood*, 44 Ill. 416; 92 Am. Dec. 189. But see, *contra*, *Claffin v. Meyer*, 75 N. Y. 260; 31 Am. Rep. 467; *Willett v. Rich*, 142 Mass. 356; 56 Am. Rep. 684.

ST. JOHNSBURY AND LAKE CHAMPLAIN RAILROAD COMPANY v. HUNT.

[60 VERMONT, 583.]

OFFICER MAY LAWFULLY STOP RAILWAY TRAIN FOR PURPOSE OF ARRESTING ITS ENGINEER, where the officer has in his hands a writ by which he is commanded to arrest the body of such engineer.

CASE for stopping the plaintiff's cars. The case was heard on demurrer to the defendant's pleas, and the demurrer was sustained. Other facts are stated in the opinion.

P. K. Gleed, for the defendant.

Ides and Stafford, for the plaintiff.

POWERS, J. This case was heard upon a general demurrer to the defendant's third special plea. The declaration in sub-

stance charged that while the plaintiff was lawfully and properly operating its railroad in running a train, of which Collins was the engineer, its engine struck and injured a heifer of the defendant, there by the fault of the defendant, wrongfully upon its track, and the defendant knowing he had no legal cause of action against the plaintiff, for the purpose of injuring the plaintiff, and delaying and hindering the operation of the railroad, sued out a writ, and caused an officer thereunder to arrest the body of Collins, the engineer, by stopping the train for that purpose.

The third plea alleges that the defendant had a legal cause of action against Collins, which was equally enforceable against the plaintiff, founded upon the negligence of Collins, the plaintiff's servant, in causing the injury to said heifer; that suit thereon was brought against Collins tortwise; that the defense to such suit was assumed by the plaintiff in behalf of Collins, and therein the question whether said heifer was unlawfully, and by the defendant's fault, upon said railroad track was litigated, and that it was adjudged in such suit that said Collins was in the wrong, and judgment was entered in favor of the now defendant against Collins; and that the arrest of Collins upon the writ in said cause was in pursuance of the defendant's legal right, and no more was done than was necessary to that end.

The question raised and argued before us was, whether an officer, having a legal process, in which he is commanded to arrest the body of the defendant, may stop a railroad train for the purpose of making an arrest of the engineer of such train. The defendant, in his brief, says: "The question submitted is this, Had the officer the legal right to stop the train for the purpose of arresting Collins?" The plaintiff, in its brief, says: "This case is not to be decided upon the theory that the plaintiff's only claim to recover rests upon the fact that, as an incident of the arrest, he lost the service of an employee. That is not the claim we press. The question is one of public policy." The court below sustained the demurrer, on the ground that the officer had no right to stop the train to arrest the body of the engineer upon civil process against him.

It is conceded by the plaintiff that an officer having proper process might lawfully stop a train to arrest its engineer in a criminal proceeding, but the argument is, that in civil proceedings the consequences are, or in conceivable cases might be, so detrimental to the public using the railroad, the court

should hold, on grounds of public policy, that the right does not exist.

The process was a legal one, commanding the officer to arrest Collins. The command in the process was the command, not of Hunt, but of the law. The officer did not act in making the arrest because Hunt commanded him, but because the law commanded him. Hunt, to be sure, had invoked the issue of the process, but the sheriff's justification and authority was the command of the process.

Cases may easily be conceived in which, upon considerations of relative convenience and inconvenience, the stopping of a train to serve a justice writ upon its engineer would seem to be ridiculous. But, on principle, would it be any more so if the train was stopped to serve a writ upon the engineer claiming ten dollars in damages for an assault and battery, than stopping it to arrest him in a criminal proceeding seeking to impose a fine of ten dollars upon him for the same assault? It will hardly do to rest the question upon conjectural difficulties. If it is a question of public policy, it is so because its usual, normal, and legitimate consequences are hurtful to the public. As a practical fact, there is little danger that officers will have occasion to stop a train for the service of process of any kind. Again, it is conceded that the officer might arrest the engineer at a station on the road. But this would delay the train just as long, and work precisely the same inconvenience to the public, as stopping it between stations.

It is admitted that an officer might stop a stage-coach to arrest the driver. This conceivably might delay the passengers on their way to a railroad station, so that they fail to reach a train that their business requires them to take. What is the difference in principle between an act which hinders the passenger on a public conveyance to the train and an act which hinders him while on the train?

If the question is one of public policy, it must apply generally to public carriers. But we think the right to arrest cannot be defeated upon any considerations that public policy forbids its exercise in the case of locomotive engineers. The command of the process is the voice of the law speaking to its officer. It is the order of the state of Vermont to do the act complained of. There is no room for the doctrine of public policy in such a case. It is illogical and absurd to say that the command of the law cannot be executed because, on

grounds of public convenience or expediency, the court thinks it better to nullify the law.

The plea alleges that the defendant's cause of action existed against the plaintiff as well as Collins. The suit for the injury to the heifer might have been maintained against the railroad company. Had it been so brought, and had the officers stopped the train to attach railroad property on board, the same mischievous consequences to the public would have resulted as those now portrayed. Can it be claimed that process against a railroad company is not to be served as it may be against other defendants because it will work inconvenience to the public? Process served upon an individual may work incidental injury to others. If a physician is arrested, his patients may suffer.

It is quite apparent that the argument that public policy forbids the service of process as made in this case is unsound and illogical. The legislature can establish any regulations in the premises that may be needed.

The judgment is reversed, and judgment is rendered that the demurrer be overruled and the third plea is sufficient.

The cause is remanded, with leave to the plaintiff to plead on the usual terms.

ON A FORMER HEARING OF THIS CASE, the court held that a railroad company may maintain an action against one who maliciously causes the arrest of the engineer of one of its trains, with intent to delay the train and injure the company: *St. Johnsbury etc. R. R. Co. v. Hunt*, 55 Vt. 570; 45 Am. Rep. 630.

BARBER'S ADMINISTRATOR v. BENNETT.

[60 VERMONT, 602.]

DECLARATIONS OF PLAINTIFF IN INTEREST AGAINST VALIDITY OF HIS CLAIM, though made before he became the owner of the claim, are admissible and competent evidence to establish a defense in a suit upon such claim, and it is error to limit the declarations to the impeachment of the plaintiff in interest.

ASSUMPSIT. Verdict for the plaintiff. The opinion states the case.

W. B. Sheldon and J. O. Baker, for the defendant.

Batchelder and Bates, and Burton and Munson, for the plaintiff.

ROWELL, J. The cause of action in this case, if any there be, is non-negotiable, and was assigned to Mrs. Jewett, the intestate's daughter, before suit brought, who thereby became the equitable owner thereof, and the suit is prosecuted for her benefit; so she is plaintiff in interest. One item sought to be recovered is for defendant's board in the intestate's family from October, 1867, to October, 1870, during most of which time Mrs. Jewett and her husband were also members of the family, and Mrs. Jewett had knowledge of the justness of the item.

The defendant showed by several witnesses that before 1871, which was long before the assignment to her, Mrs. Jewett said that the defendant more than paid his board while he lived in the family. Mrs. Jewett was a witness, and denied having made such statements. In the charge, the court limited the testimony to the impeachment of Mrs. Jewett, and denied its competency as tending to show the fact of payment, to which the defendant excepted; and we think the exception broad enough to raise the question.

Robinson v. Hutchinson, 31 Vt. 448, if followed, is decisive on this point. There a will was contested on the ground of want of testamentary capacity, and undue influence of the executor and his brother, who were sons of the testatrix and legatees under the will. The contestants proved that at one time when his mother was sick, about four years before the will was made, the executor said she "did not know what she was talking about"; and this was held proper, because he had consented to act as executor, and had taken upon himself the duty of sustaining the will, and was interested in its provisions. It is not important that the executor was a party of record as well as in interest, for the law looks chiefly to the real parties in interest, and regards them as though they were parties of record: 1 Greenl. Ev., sec. 180; 1 Phill. Ev. *486; *Hanson v. Parker*, 1 Wils. 257; while, on the other hand, the admissions of a party of record who is a mere trustee, or whose name is used as matter of form, are not receivable: *Sargeant v. Sargeant*, 18 Vt. 371; nor, as we shall see hereafter, are the admissions of one who sues in a representative capacity only, unless made while that character was sustained.

We think *Robinson v. Hutchinson*, *supra*, is sound, though *Burton v. Scott*, 3 Rand. 399, is a similar case, and decides the other way, on the ground that the rule that the admissions of a party are evidence against him rests upon the presumption that no one will make a declaration against his own in-

terest unless it is true, and hence, that the interest must exist when the declaration is made. If this were the true ground of the rule, the logic of that case is irresistible. But it is not the true ground. The mistake lies in supposing the presumption to be the test of admissibility, whereas it is only a test of credibility; for, as said by Professor Greenleaf, in regard to many admissions, it cannot be supposed that, at the time of making them, the party believed they were against his interest, but often the contrary. Therefore, he says such evidence seems to be more properly admissible as a substitute for the ordinary legal proof: 1 Greenl. Ev., sec. 169. Mr. Wharton says it is admissible, either as yielding presumptions against the party charged, or as relieving (under ordinary circumstances) the party offering it from the necessity of more formal proof: 2 Wharton on Evidence, sec. 1077.

Mr. Justice Stephen defines an admission to be a statement that suggests an inference as to a fact in issue, or a fact that is relevant or deemed to be relevant to such fact, made by or on behalf of a party to a proceeding; and says that every admission is deemed to be a relevant fact as against the person making it, except in certain cases; as, when made by a person suing or sued in a representative character only, in which case it must be made while the person making it sustained that character: Stephen's Digest of Evidence, 53, 54. *Dent v. Dent*, 3 Gill, 482, to which we have been referred, comes within this exception; and there are many other cases to the same effect. So when, by succession of title, a party to a suit is so far in privity with another that he could be affected by his acts, then he can be affected by his admissions only when they are made during the latter's interest in the subject-matter of the suit; for then only can he ingraft them upon the interest so that they will follow it into the hands of his successor. But as to the self-dis-serving declarations of the real party to the suit, this, as we have seen, is not the test of admissibility. And although the best text-writers do not all suggest precisely the same ground of admissibility, yet we venture to say that it is a sufficient ground that they are the declarations of a party in interest, and are relevant to the issue.

This view renders it unnecessary to consider the other exception.

Judgment reversed and cause remanded.

DECLARATIONS AGAINST INTEREST OF PARTY ARE ADMISSIBLE IN EVIDENCE AGAINST HIM: *Dennis v. Chapman*, 19 Ala. 29; 54 Am. Dec. 186.

SMITH v. NIAGARA FIRE INS. CO.

[60 VERMONT, 632.]

QUESTION, THOUGH IMPROPER, IF NOT SHOWN TO HAVE BEEN ANSWERED by the witness to whom it was put, is not ground for reversal.

PAYMENT OF MORTGAGE NOTE IS NOT PRESUMED UNTIL FIFTEEN YEARS have elapsed since its maturity.

MORTGAGE PAID, BUT NOT DISCHARGED, IS NOT ENCUMBRANCE, within the meaning of an insurance contract.

FAILURE OF INSURED TO STATE THAT HE BELIEVED PROPERTY WAS MORTGAGED is an omission to state information material to the risk, although the mortgagee had, without the knowledge of the insured, previously voluntarily destroyed the note secured by the mortgage, the insured having, at the time of the contract of insurance, warranted that he had not omitted to state to the company any information material to the risk. At least, such failure is evidence from which that fact might be found, and if it was a question of law, the court should direct a verdict for the defendant, or if it was a question of fact, it should be submitted to the jury with proper instructions.

GENERAL AGENT OF INSURANCE COMPANY HAS POWER TO WAIVE STATEMENT OF LOSS, notwithstanding such statement is by the terms of the policy a condition precedent to recovery, unless his power is restricted, and the restriction was known to the insured.

POWER TO WAIVE STATEMENT OF LOSS IS NOT POSSESSED BY LOCAL AGENT of an insurance company, who has never been held out by it as possessing any other authority than to receive proposals for insurance, fix rates of premiums, and issue policies, and who has never acted in the settlement of losses.

GENERAL AGENT OF INSURANCE COMPANY CAN WAIVE PROOF OF LOSS ONLY IN MANNER PROVIDED in the contract; he cannot waive such proof orally when the contract requires the waiver to be indorsed on the policy.

ASSUMPSIT on an insurance policy. Verdict for the plaintiffs. The second request of the defendant, referred to in the opinion, was, that a verdict should be directed for the defendant, "because at the time the application for the insurance was made, and upon which the defendant company issued the policy upon which this suit is brought, she, the said plaintiff, represented that the property insured was not encumbered, when in fact the plaintiffs had executed the mortgage aforesaid, and had not paid the same, and had no reason to believe but what said mortgage was a valid and subsisting claim and mortgage at the time said application for insurance was made." The other facts are stated in the opinion.

Haskins and Stoddard, for the defendant.

Waterman, Martin, and Hitt, and S. T. Davenport, for the plaintiffs.

Taft, J. 1. The defendant objected to an inquiry of a witness upon the subject of damages. Conceding the question to have been improper, the exceptions do not show that it was answered. To avail the defendant, it must so appear, and that the answer was prejudicial to it: *Carpenter v. Corinth*, 58 Vt. 214.

2. The assured warranted that there was no encumbrance upon the property. There was then upon record an undischarged mortgage for eight hundred dollars, with accrued annual interest for sixteen years. The plaintiffs claimed that the presumption of payment applied, fifteen years having then elapsed since the date of the note and mortgage. The note matured in July, 1875, and it was at the latter date that the fifteen years began to run, so as to afford a presumption of payment from lapse of time. The fifteen years have not yet expired, the presumption, therefore, did not arise.

3. Was the undischarged mortgage an encumbrance within the meaning of an insurance contract? It has sometimes been so held: *Warner v. Middlesex Mut. Ass. Co.*, 21 Conn. 444; *Muma v. Niagara etc. Ins. Co.*, 22 U. C. Q. B. 214; but we think the doctrine generally prevails, that if the mortgage debt has been paid, the undischarged mortgage is not an encumbrance: *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; 29 Am. Rep. 184; *Hawkes v. Dodge Co. M. Ins. Co.*, 11 Wis. 188, as cited in *Bates's Digest of Fire Insurance Decisions*, 256, and we so hold.

4. The assured warranted that they, at the time of the contract, had "not omitted to state to the company any information material to the risk." The undischarged mortgage was held by Mrs. Eames, and she had, prior to that time, secretly and voluntarily destroyed the note, but the assured had not been informed of that fact, so that they must have believed that the mortgage debt was then a valid subsisting lien upon the property. No payment had been made on either the principal or interest. The more important question in respect to the mortgage is, whether the failure to state to the company that they believed the property was mortgaged was not an omission to state information material to the risk. Statements as to encumbrances are material; they are made so by the policy; they have regard to the risk. The object of inquiry in respect thereto is to ascertain the interest of the applicant in the property, so that the insurer can take into consideration the interest the applicant has in its preserva-

tion. He may have none, so that fire may occur from his neglect, or his active participation in its origin. The value of the property burned, as found by the jury, was \$837; it was insured for \$1,350, \$900 upon the buildings, the remainder upon their contents. The real estate was mortgaged for more than sixteen hundred dollars, as the plaintiffs then believed. Had the mortgage debt still existed, the statute barred any recovery upon the notes, and the policy was not payable to the mortgagee in case of loss. If the buildings did not burn, the property would be held by the mortgagee; if they did, the assured would receive their value as the avails of the policy would belong to them. The moral hazard was exactly the same if they believed the property mortgaged as it would have been had the mortgage in fact existed. We think that when they failed to state the fact that they believed the property was mortgaged, they omitted to state information material to the risk; at least, their failure was evidence from which that fact might have been found. We have no occasion to pass upon the point of whether this was a question for the court or jury. If it was a question of law, the court should have complied with the second request; if of fact, it should have submitted it to the jury with proper instructions. The question, under the claim of the defendant and the evidence, was in the case, should have been disposed of either as one of law or fact, and was saved by the exception to the charge raised by the second request.

5. By paragraph 8 of the sixth condition of the policy, it was the duty of the assured in case of loss to furnish the defendant, within thirty days, a statement of the loss, signed and sworn to. It is conceded that no statement was furnished. It was a condition precedent to a recovery, as it was so provided by the terms of the policy: *Donahue v. Ins. Co.*, 56 Vt. 374. That the proofs of loss may be waived by the company is unquestioned: *Findeison v. Metropole Ins. Co.*, 57 Id. 520. The plaintiffs claimed upon trial that the proofs of loss were waived; the jury so found. The evidence upon which this finding was based was the testimony of the plaintiffs, as to the declarations of Turner and Cudworth, who, as the plaintiffs claim, were acting as the agents of the defendant. Turner was the general agent of the defendant, having supervision of all its affairs, and its adjuster of losses; and unless restricted in his authority, the plaintiffs, having notice thereof,

we think had all the power of the company, in the settlement of a loss, to waive any of the conditions of the policy.

6. Cudworth was the local agent of the company, with power to receive proposals for insurance, fix rates of premiums, and issue policies. It does not appear that he was ever held out by the defendant as possessing any other authority, or ever acted in the settlement of losses. We think he had no authority to waive that condition of the policy requiring a sworn statement in the settlement of a loss, although he might, unless restricted, waive conditions concerning the issuance of a policy, or anything apparently within the scope of his authority, in the business committed to him. We recognize the full force of the rule as to the liability of the principal for the acts of an agent, as stated in *Insurance Co. v. Wilkinson*, 18 Wall. 222, "that the powers of an agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals." The settlement of losses was no part of the business of Cudworth; he was not for that purpose the defendant's agent: *Bowlin v. Hekla Fire Ins. Co.*, 86 Minn. 433; *Kyte v. Commercial Un. Ass. Co.*, 144 Mass. 43. The jury were at liberty, under the charge, to find a waiver from the declarations of either Turner or Cudworth. If they found it from those of the latter, it was error, as he possessed no authority to waive a sworn statement; and as the waiver may have been found from the illegal testimony, there was error in this branch of the case, irrespective of the question of the authority of Turner.

7. Having held that Turner had authority to waive any condition of the policy, the question remains whether he could do so save in the manner provided by the contract. One condition of the policy is, that no officer, agent, or representative of the company should be held to have waived any of the conditions of the policy unless such waiver was indorsed on the policy. This provision was a valid one, binding upon the parties, and effect should be given to it. While the defendant could give its oral consent to a waiver of the statement, no officer, agent, or representative could consent unless the consent was indorsed on the policy. This point we think well taken. In *Carrigan v. Insurance Co.*, 53 Vt. 418, the contract provided that no agent was empowered to waive any of its conditions without special authority, etc., and it was held that this term referred to local agents, not general ones, and the

tion. He may have none, so that fire may occur from his neglect, or his active participation in its origin. The value of the property burned, as found by the jury, was \$837; it was insured for \$1,350, \$900 upon the buildings, the remainder upon their contents. The real estate was mortgaged for more than sixteen hundred dollars, as the plaintiffs then believed. Had the mortgage debt still existed, the statute barred any recovery upon the notes, and the policy was not payable to the mortgagee in case of loss. If the buildings did not burn, the property would be held by the mortgagee; if they did, the assured would receive their value as the avails of the policy would belong to them. The moral hazard was exactly the same if they believed the property mortgaged as it would have been had the mortgage in fact existed. We think that when they failed to state the fact that they believed the property was mortgaged, they omitted to state information material to the risk; at least, their failure was evidence from which that fact might have been found. We have no occasion to pass upon the point of whether this was a question for the court or jury. If it was a question of law, the court should have complied with the second request; if of fact, it should have submitted it to the jury with proper instructions. The question, under the claim of the defendant and the evidence, was in the case, should have been disposed of either as one of law or fact, and was saved by the exception to the charge raised by the second request.

5. By paragraph 3 of the sixth condition of the policy, it was the duty of the assured in case of loss to furnish the defendant, within thirty days, a statement of the loss, signed and sworn to. It is conceded that no statement was furnished. It was a condition precedent to a recovery, as it was so provided by the terms of the policy: *Donahue v. Ins. Co.*, 56 Vt. 374. That the proofs of loss may be waived by the company is unquestioned: *Findeison v. Metropole Ins. Co.*, 57 Id. 520. The plaintiffs claimed upon trial that the proofs of loss were waived; the jury so found. The evidence upon which this finding was based was the testimony of the plaintiffs, as to the declarations of Turner and Cudworth, who, as the plaintiffs claim, were acting as the agents of the defendant. Turner was the general agent of the defendant, having supervision of all its affairs, and its adjuster of losses; and unless restricted in his authority, the plaintiffs, having notice thereof,

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7. Having held that Turner had authority to waive any condition of the policy, the question remains whether he could do so save in the manner provided by the contract. One condition of the policy is, that no officer, agent, or representative of the company should be held to have waived any of the conditions of the policy unless such waiver was indorsed on the policy. This provision was a valid one, binding upon the parties, and effect should be given to it. While the defendant could give its oral consent to a waiver of the statement, no officer, agent, or representative could consent unless the consent was indorsed on the policy. This point we think well taken. In *Carrigan v. Insurance Co.*, 53 Vt. 418, the contract provided that no agent was empowered to waive any of its conditions without special authority, etc., and it was held that this term referred to local agents, not general ones, and the

case notes the distinction between the two; here the limitation is upon the authority of any officer, agent, or representative. If Turner was not an officer, he was certainly a representative, and his want of authority to waive any condition unless by writing indorsed on the policy was brought to the knowledge of the plaintiffs by the contract itself; and where an agent's acts are in excess of such authority, the principal is not bound: *Insurance Co. v. Wilkinson*, *supra*; *Packard v. Dorchester M. F. Ins. Co.*, 77 Me. 144.

Where an agent has apparent authority to do an act, his principal is bound, and if the latter claims that the act is in excess of the agent's real authority, he should show actual notice to the party with whom he deals. In the case at bar the law presumes notice; it is a part of the contract, the plaintiffs agreed to it. Why should they be released from their agreement?

In *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5, the court were called upon to meet a question similar to the one involved here, and they said: "The company could itself dispense with this condition by oral consent as well as by writing, and Carpenter (the agent), unless specially restricted, would have possessed, in this respect, the power of the principal. But the policy contains the provision that no agent of the company shall be deemed to have waived any of the terms and conditions of the policy unless such waiver is indorsed on the policy in writing. This is a plain limitation upon the power of agents, and can mean nothing less than that agents shall not have the power to waive conditions except in one mode, viz., by an indorsement on the policy. The plaintiff is presumed to have known what the contract contained, and the proof tends to the conclusion that this provision was brought to his notice. He saw fit, however, to accept the assurance of the agent that an entry in the register was sufficient. It is difficult to see how, upon the law of contracts and agency, the plaintiff can recover. The entry in the register was not an indorsement on the policy. The oral consent was an act in excess of the known authority of the agent. The provision was designed to protect the company against collusion and fraud, and the dangers and uncertainty of oral testimony. The case seems to be a hard one for the plaintiffs; but courts cannot make contracts for parties, nor can they dispense with their provisions."

The same court, in *Marvin v. Universal Life Ins. Co.*, 85

N. Y. 278, 39 Am. Rep. 657, in disposing of an analogous question, said: "Here the policy in plain terms denied to any agent, local or general, the power to waive conditions, reserved that authority solely to the 'head office,' and some officer of the company there, and gave notice to the assured upon the face of his policy of the existence of this restriction. Henkle therefore had no power to waive payment."

The same rule has been followed in Massachusetts: *Forbes v. Agawam M. F. Ins. Co.*, 9 Cush. 470. In *Worcester Bank v. Hartford F. Ins. Co.*, 11 Cush. 285, 59 Am. Dec. 145, under a like limitation, an agent took the policy, made a memorandum on a book, and told the assured that it was the same as if indorsed on the policy; the court held that the policy was void. In *Hale v. Mechanics' M. F. Ins. Co.*, 6 Gray, 169, the policy prohibited previous insurance without the consent of the president in writing; it was held that the policy was invalid, although the jury found an oral consent by the president. The same question arose in the late case of *Kyte v. Commercial Un. Ass. Co.*, 144 Mass. 43. After discussing the question of the agent's authority, the court said: "Even if the agent had the fullest authority, could the conditions of the policy be waived other than in the manner in which they provide for such waiver? The company, which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent, has prescribed only a reasonable rule to guard against the uncertainties of oral evidence, and by this the assured has assented to be bound." If, in this case, Turner, by consenting orally to a waiver of the proofs of loss, can estop the defendant from raising this defense, then the clause of the contract requiring the waiver of a condition to be indorsed on the policy is rendered nugatory. No one can successfully contend that the company has not the right to restrict the power of its agents; and when such power is limited, is there any good reason why such limitation should not bind the assured? The plaintiffs cannot rely upon their ignorance of the terms of their contract; certainly not in the absence of fraud, and none is claimed in this case. In the late case of *Cleaver v. Traders' Ins. Co.*, 16 Ins. L. J. 744, Sup. Ct. Mich., April, 1887, the supreme court of Michigan conclude an opinion in a case involving the question, as follows: "When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of

the company with the insured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy."

To bind the defendant by a waiver of the proofs of loss, it should have been indorsed on the policy.

Judgment reversed and cause remanded.

GENERAL AGENT OF FIRE INSURANCE COMPANY HAS POWER TO WAIVE CONDITIONS in policy: See *Kruger v. Western F. I. Co.*, 72 Cal. 91; 1 Am. St. Rep. 42, and note. As to who is a general agent, see *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83.

MISREPRESENTATION CONCERNING ENCUMBRANCES RENDERS POLICY VOID, where the policy provides for forfeiture in such case: *Gould v. Mutual F. I. Co.*, 47 Me. 403; 74 Am. Dec. 494; *Cooper v. Farmers' Mut. F. I. Co.*, 50 Pa. St. 299; 88 Am. Dec. 544, and note.

CASES

IN THE

SUPREME JUDICIAL COURT

OF

MAINE.

NUGENT v. BOSTON, CONCORD, AND MONTREAL R. R.

[80 MAINE, 62.]

QUESTION OF CONTRIBUTORY NEGLIGENCE IS PROPERLY FOR THE JURY where the facts though undisputed are such that different inferences may be fairly drawn therefrom, or are those upon which fair-minded men may reasonably arrive at different conclusions.

TORT — LEASED RAILROAD. — Railroad company over a section of whose track another company runs its trains, by virtue of a contract, is liable in tort to the latter's brakeman, who, without the fault of himself or of his co-employees, receives a personal injury while in the performance of his duty on his employer's train, solely by reason of the negligent construction of the former's depot.

LIABILITY OF LESSOR OF RAILROAD FOR NEGLIGENCE OF LESSEE. — An authorized lease without any exemption clause absolves the lessor from the torts of the lessee, resulting from the negligent operation and handling of its trains, and the general management of the leased road over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station-houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility.

RAILROAD. — COVENANT FROM LESSOR TO KEEP ROAD IN ORDER AND REPAIR, or to "save the lessor harmless," while it may afford a means of indemnity to the lessor, does not shield him from responsibility.

EVIDENCE. — IN ACTION AGAINST RAILROAD COMPANY for injury to brakeman, caused by proximity to passing cars of negligently constructed awning at station, evidence is admissible as to the proximity of awnings at other stations on the road.

EVIDENCE. — UPON QUESTION WHETHER ORDINARY CARE WAS EXERCISED BY BRAKEMAN who had sustained an injury from the proximity of a negligently constructed awning while rapidly ascending ladder on box-car, one who has had experience in going up and down such ladders for several years may testify that they were not all alike, and that it required in consequence the undivided attention of a person ascending them.

THE material facts sufficiently appear in the opinion, with the exception of certain evidence given by one Sawyer, witness for the plaintiff, who testified that he was conductor on the train where plaintiff was employed when injured, that his (Sawyer's) experience in ascending ladders on moving cars had been a daily one, extending over a period of four years, that such ladders were not all alike, and that it required in consequence the undivided attention of a person ascending them. This testimony was objected to, but was admitted.

Wilbur F. Lunt and Joseph W. Spaulding, for the plaintiff.

A. A. Strout, for the defendant.

VIRGIN, J. By a contract of March 1, 1884, the Portland and Ogdensburg Railroad Company, for certain valuable considerations therein expressed, was permitted, among other things, to run all of its through freight trains, for one year at least, over that portion of the defendant's tracks between certain named stations, between which was the Bethlehem station, the defendant "assuming all liability and risk of accident arising from defect of road-bed or track, or default of its employees or servants."

On June 19, 1884, while the permit was in full force, the Boston and Lowell Railroad Company leased for ninety-nine years the defendant's railroad, stations, etc., agreeing to save harmless the defendant "against all claims for injuries to persons during the term, from any and all causes whatever."

The plaintiff was rear brakeman on a Portland and Ogdensburg special freight train bound west. While he, in pursuance of a signal for setting brakes, was rapidly ascending the iron ladder on the side of a box-car to perform his duty of setting the brake thereon, the train being in motion, his head came in contact with the end of the depot awning, of same height as the car, and eighteen inches therefrom, and he was thereby knocked off between the cars, and before he could extricate himself, his right arm was so crushed by the wheels of the saloon-car that amputation became necessary.

The jury, after a charge to which, so far as the general merits of the case is concerned, no exception is alleged, returned a verdict for the plaintiff for three thousand one hundred dollars. Under the instructions, the jury must have found that the awning was negligently constructed on account of its proximity to the passing car; second, that the in-

jury was caused solely thereby; and third, that the plaintiff was in the exercise of ordinary care at the time of the injury.

1. It is contended that the plaintiff was guilty of contributory negligence; and that, as the facts in relation thereto were undisputed, the question was one of law, and should, therefore, have been decided by the presiding justice, which he declined to do, but submitted it to the jury. While there are numerous cases wherein questions of the negligence of both parties in actions of this nature have been decided by the court on undisputed facts, still the negligence of neither party can be conclusively established by a state of facts from which different inferences may be fairly drawn, or upon which fair-minded men may reasonably arrive at different conclusions: *Brown v. European etc. R. R. Co.*, 58 Me. 384; *Leasn v. Maine Central R. R. Co.*, 77 Id. 85, 91; *Shannon v. Boston etc. R. R. Co.*, 78 Id. 52, 60; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; 85 Am. Dec. 720; *Treat v. Boston etc. R. R. Co.*, 131 Mass. 871; *Peverly v. Boston*, 136 Id. 366; *Lawless v. Connecticut River R. R. Co.*, 136 Id. 1; *Railroad Co. v. Stout*, 17 Wall. 657, 663, 664.

As a practical illustration of this proposition: The conductor of a freight train had resided at the place of accident for twenty years, and as conductor and brakeman passed the station once or twice daily for seven years. Just as his train started up, he caught hold of the side-ladder of a passing car, and, without any call of duty there, as he climbed toward the top, was struck and killed by the roof of the depot which projected over, and within thirty-four inches of the car; and the court was divided on the questions of negligence involved: *Gibson v. Erie Railway Co.*, 63 N. Y. 449. So in another case, where a brakeman (the plaintiff), who had pulled out the pin and disconnected a portion of the train from the engine, was walking beside the train, and on signal for brakes ran up the side-ladder of a car and was struck, knocked off, and lost his arm by the awning, which projected within eighteen inches of the car, the court held the plaintiff not guilty of contributory negligence, but set aside the verdict of ten thousand dollars as excessive. The court remarked: "It would be preposterous in us to say, or to ask a jury to say, that a brakeman, engaging in the service of the company, must be held to know whether or not there may be one among the station-houses whose roof or awning so projects over the line of the road that a brakeman on a freight train, in the performance of his du-

ties, would be liable to be swept from the train by collision with it": *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183.

We are of opinion that the presiding justice very properly submitted to the jury the question of the defendant's negligence, and also that of the plaintiff's exercise of ordinary care.

Moreover, a careful examination of all the testimony bearing upon these questions, aided by the exhaustive argument of counsel, has failed to satisfy us that we ought to interpose and set the verdict aside. And without taking space to state our reasons at length, we remark, the train never stopped at this station, except when obstructed by another, and occasionally down by the tank for water. His attention was never particularly called to the nearness of the awning, as he had no occasion to notice it in passing. When the accident happened, the plaintiff was engaged in the prompt performance of a call to active duty. The exigency caused by the repeated starting and stopping of the mixed train required his speedy ascent to the top of the car by means of the ladder. Before he reached it, his car, being in motion, arrived at the awning. Due care on the part of the defendant required space enough between the car and the awning for reasonable action of body, arms, and legs of the brakeman, whose duty required him to ascend the ladder there. It was deficient in this respect, and the plaintiff, with his attention properly fixed on his duty, was struck. It is no answer that the train, though on a downgrade of thirty feet to the mile, might be handled by the engine when working steam. The plaintiff's duty was not to rely on the possibility of the engine holding the train, but to perform the duty signaled by the conductor standing on the engine; and he lost his right arm in the prompt attempt to perform it, in consequence of the defendant's faulty awning. The acts of the plaintiff "cannot be judged of by the rule applicable to persons engaged in no special or particular duty." The plaintiff's previous knowledge of the awning must, on account of his few opportunities for gaining it, have been comparatively slight, and was "by no means decisive. The service then and there to be performed was of a character to require his exclusive attention to be fixed upon it, and that he should act with rapidity and promptness; and it could hardly be expected that he should always bear in mind the existence of the defect, even if he knew it, or be prepared at all times to avoid it": *Snow v. Housatonic R. R. Co.*, 8 Allen, 441, 450; 85 Am. Dec. 720.

But while this rule may not be seriously questioned as between a railroad company and its own employees, the defendant challenges its application as between it and the plaintiff. This presents the question whether a railroad company, over a section of whose track another company, by virtue of a contract, runs its trains, is liable in tort to the latter's brakeman, who, without the fault of himself or of his co-employees, receives a personal injury while in the performance of his duty on his employer's train, solely by reason of the negligent construction of the former's depot. We are of opinion that it is.

In such a case the only materiality which attaches to the contract between the companies is to make certain that the plaintiff was lawfully and not a trespasser on the defendant's road. And although the defendant, in its contract with the Portland and Ogdensburg company, in express terms "assumed all liability and risk of accident arising from defect of road-bed, track, or default of its employees," nothing was thereby added to the defendant's legal obligation and duty; these terms did not express all which the law required of railroad companies as to the reasonable safety of its station-houses: *Tobin v. Portland etc. R. R. Co.*, 59 Me. 183; 8 Am. Rep. 415. It is common learning that as a compensation for the grant of its corporate franchise intended in large measure to be exercised for the public good, the common law imposed upon the defendant a duty to the public, independent of contract and co-extensive with its lawful use, to keep its road and its appurtenances in a reasonably safe and proper condition: *Thomas v. Railroad*, 101 U. S. 71, 83; *Bean v. Atlantic etc. R. R. Co.*, 63 Me. 293, 295. If the cause of action were a breach of the contract, the plaintiff could not maintain an action thereon for want of privity. But this is an action *ex delicto*, for an injury caused by a neglect of a duty created by law: Broom's Commentaries, 4th ed., 675, 676, and cases. And for the neglect of such a duty, privity is not essential to the maintenance of an action of tort therefor: *Campbell v. Portland Sug. Co.*, 62 Me. 552, 564; Broom's Commentaries, 673 et seq.

This principle is variously illustrated by the numerous cases cited in Broom's Commentaries, 655-670. Thus a railroad company is liable for the loss of a passenger's luggage whose fare was paid by another, not on account of breach of contract, but of legal duty: *Marshall v. York etc. R. R. Co.*, 11 Com. B., 73 Eng. Com. L. 655.

So where the defendant sold naphtha to one known to him as a retailer of fluids, to be burned in lamps for illuminating purposes, and the retailer sold a pint thereof to the plaintiff to be used in a lamp, and it exploded, the defendant was held liable, "not upon any supposed privity between the parties, but upon a violation of duty in the defendant, resulting in an injury to the plaintiff": *Wellington v. Downer Ker. Oil Co.*, 104 Mass. 64, 67.

So where a chemist compounded a hair-wash, and knowingly sold it to a husband for the use of his wife, who was injured by its use, the wife sustained an action of tort for the injury, on the ground of the defendant's breach of duty: *George v. Skinnington*, L. R. 5 Ex. 1.

In like manner, "where a stage proprietor," said Parke, B., "who may have contracted with the master to carry his servant, is guilty of neglect, and the servant sustains personal damage, he is liable to the latter; for it is a misfeasance toward him, if, after taking him as a passenger, the proprietor or his servant drives without care, as it is a misfeasance towards every one traveling on the road. So if a mason contracts to erect a bridge or other work over a public road, which he constructs not according to the contract, and the defects are a nuisance, a third person, who sustains an injury by reason of its defective construction, may recover damages from the contractor, who will not be allowed to protect himself from liability by showing an absence of privity between himself and the injured person, or by showing that he is responsible to another for breach of the contract": *Longmeid v. Holliday*, 6 Eng. L. & Eq. 563.

So where a station, being in the joint occupation of the defendant and another railway, the plaintiff's decedent, a blacksmith in the service of the other railway, while engaged in repairing one of its wagons on a siding at the station, was killed by the negligent shunting of the defendant's train on that siding, a motion to set aside a verdict for the plaintiff was overruled: *Vose v. L. & Y. R'y*, 2 Hurl. & N. 728.

And it seems that an apothecary who administers improper medicine to his patient, or if a surgeon unskillfully treat him to his injury, is liable to the patient, even when a father or friend of the patient was the contractor: *Pippin v. Sheppard*, 11 Price, 40; *Gladwell v. Steggall*, 5 Bing. N. C. 733, Eng. Com. L. 292; *Thomas v. Winchester*, 6 N. Y. 397.

This principle is sustained in the well-considered case of

Sawyer v. Rutland & B. R. R. Co., 27 Vt. 370, which was re-examined and reaffirmed by the same learned court in *Merrill v. Central Vermont R. R. Co.*, 54 Id. 200; also in *Smith v. New York etc. R. R. Co.*, 19 N. Y. 127; 75 Am. Dec. 805; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; 85 Am. Dec. 720; *Pierce on Railroads*, 274; *Patterson on Railway Accidents*, sec. 228; 2 *Wood on Railway Law*, 1338, 1339, and notes.

We are aware that this view is not in accordance with *Murch v. Concord R. R. Co.*, 29 N. H. 85, and *Pierce v. Concord R. R. Co.*, 51 Id. 593, which cases were cited by a divided court in this state on another point: *Mahoney v. Atlantic etc. R. R. Co.*, 63 Me. 72; but notwithstanding our high opinion of the learned court which pronounced those opinions, we think the views herein declared are more satisfactory.

Our opinion, therefore, is, that the plaintiff had the lawful right, as brakeman on the train of the Portland and Ogdensburg, to pass and repass by the Bethlehem station-house of the defendant, which, therefore, owed a duty to him to construct and maintain its station-house there in such a reasonably safe manner that its awning would not injure him while in the performance of his duty with due care; and that a negligent breach of that duty by the defendant having resulted in a personal injury to the plaintiff without fault on his part, he is entitled to maintain this action therefor, unless the leasing and consequent full possession of the defendant's road by the Boston and Lowell constitutes a defense.

It is declared to be the settled law of this country that one railroad corporation cannot, without statutory authority, divest itself of or relieve itself from any duty or liability imposed by its charter or the general laws of the state, by leasing its road and appurtenances to another: *York & M. L. R. R. Co. v. Winans*, 17 How. 80; *Thomas v. Railroad Co.*, 101 U. S. 71, 83.

Assuming the lease of the defendant road, station-houses, etc., to the Boston and Lowell to have been duly authorized by the respective legislatures of the states which granted their charters, and that the lessee had, months before the plaintiff's injury, received under the lease full possession, management, and control, was the defendant thereby relieved from liability to this plaintiff for his injury?

This court has held that an authorized lease of a railroad does not relieve the lessor from the liability under the general statute for an injury caused to property along its line by fire

communicated by a locomotive of the lessee: *Pratt v. Atlantic etc. R. R. Co.*, 42 Me. 579; *Stearns v. Atlantic etc. R. R. Co.*, 46 Id. 95. In Massachusetts, both lessor and lessee are held liable for the injury under a like statute: *Ingersoll v. Stockbridge etc. R. R. Co.*, 8 Allen, 438; *Davis v. Providence etc. R. R. Co.*, 121 Mass. 134.

Courts of the highest respectability have held in well-considered opinions that the duly authorized leasing of one railroad to another does not absolve the lessor from liability to a passenger for injury caused by the negligent acts of the lessee's employees, unless the statute authorizing the lease contains an express exemption to the lessor; that "grants to corporations, whether of powers or exemptions, are to be strictly construed, and their obligations are to be strictly performed, whether they may be due to the state or to individuals": *Singleton v. Southwestern R. R.*, 70 Ga. 464; 48 Am. Rep. 574; *Nelson v. Vermont etc. R. R. Co.*, 26 Vt. 717; 62 Am. Dec. 614; 1 Redfield on Railways, 590.

This view is adopted and sustained in an opinion reviewing the cases and authorities by the court in Illinois. The court, in its opinion, does not rest its decision "upon the narrow ground alone of the lessee being in the exercise of a franchise which belonged to the lessor, and in so doing is to be held as the servant of the lessor corporation; but in consideration of the grant of its charter, the corporation undertakes the performance of duties and obligations toward the public; and there is a matter of public policy concerned that it should not be relieved from the performance of its obligations without the consent of the legislature"; adding, "There is no express exemption in the statute which authorized the lease": *Balsley v. St. Louis etc. R. R. Co.*, 119 Ill. 68; 59 Am. Rep. 784; see also Pierce on American Railway Law, 244.

In this state, where the defendant had leased its road under the authority of a statute which expressly provided that "nothing contained therein . . . shall exonerate the lessor from any duties or liabilities imposed upon it by the charter or by the general laws of the state," a divided court held that the lessee, and not the lessor, was liable to a passenger injured by an assault and wrongful expulsion from its train by one of the lessee's servants: *Mahoney v. Atlantic etc. R. R. Co.*, 63 Me. 68. This case, however, does not meet the facts in the case at bar; for there the injury complained of resulted solely in the wrongful acts of the servant of the lessee, who had sole

control of the trains, and not as here, from the wrong of the lessor in the negligent original construction of its depot.

And herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee, resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station-houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility: *St. Louis etc. R. R. Co. v. Carl*, 28 Kan. 622; 11 Eng. & Am. R'y Cas. 458.

The covenant in the lease to "save the lessor harmless," etc., is predicated of an implication of a primary liability on the part of the lessor. It is an obligation which in no wise affects the plaintiff, or the defendant's liability to him, but is simply a contract for reimbursement for such damages as may in any wise be recovered against it by the plaintiff and other lawful claimants, whose injury results from its breach of duty owed them.

We are also of opinion that the defendant is liable under the rule which governs the responsibility of a lessor of demised premises for their condition. For it is settled law that when the owner lets premises which are in a condition which is unsafe for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable, whether in or out of possession, for the injuries which result from their state of insecurity to persons lawfully upon them; for by the letting for profit he authorizes a continuance of the condition they were in when he let them, and is therefore guilty of a non-feasance. Among the numerous cases supporting this general view are *Rosewell v. Prior*, 2 Salk. 459, same case more fully reported, 12 Mod. 635, 639, where the defendant erected a house, thereby obstructing the plaintiff's ancient lights, and demised it to another; and the court held the "action well brought, . . . for before his assignment over, he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting over": See also *Rex v. Pedly*, 1 Ad. & E. 822; *Staple v. Spring*, 10 Mass. 72; *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254; *House v. Metcalf*, 27 Conn. 631; *Todd v. Flight*, 9 Com. B., N. S., 377.

In the last case, Earle, C. J., after reviewing *Rex v. Pedly*, 3 Nev. & M. 627, and *Rosewell v. Prior*, 2 Salk. 460, said: "These cases are authorities for saying that if the wrong causing the damage arises from the non-feasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him. And we are of opinion that the principle so contended for on behalf of the plaintiff is the law, and that it reconciles the cases." Also *Nelson v. Liverpool Brewery Co.*, L. R. 2 Com. P. 311; *Awing v. Jones*, 9 Md. 108; *Gandy v. Jubber*, 5 Best & S. 76; 5 Id. 486; 9 Id. 15; *Stratton v. Staples*, 59 Me. 94. This principle is recognized in *Campbell v. Portland S. Co.*, 62 Id. 552; 16 Am. Rep. 503; and in *McCarthy v. York County Sav. Bank*, 74 Me. 315, 325; *Burbank v. Bethel S. M. Co.*, 75 Id. 373, 383; 46 Am. Rep. 400; *Allen v. Smith*, 76 Me. 335, 341. See also *Godley v. Hagerty*, 20 Pa. St. 387, 59 Am. Dec. 731, affirmed in *Carson v. Godley*, 26 Pa. St. 111, 67 Am. Dec. 404, where buildings were let to the government as bonded warehouses, and being defectively built and of insufficient strength, they fell by reason of storage of heavy merchandise.

So in Maryland, in *Albert v. State*, 68 Md. 325, 59 Am. Rep. 159, the court of appeals approved the instruction: "If the jury found that the defendant was the owner of the wharf and rented it to the tenant, and that at the time of the renting the wharf was unsafe, and the defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and the accident happened in consequence of such condition, then the plaintiff was entitled to recover."

So in *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295, the court, after an elaborate review of the cases, held that the lessors of a pier in the possession of their lessee, from whom they received rent for it, were liable for an injury received by a longshoreman engaged in discharging a cargo thereon, the cause of the injury being a dangerous defect which existed at the time of the demise.

In a very recent case in Rhode Island of like facts, the court held both lessor and lessee jointly liable: *Joyce v. Martin*, 15 R. I. 558; see also the recent case in New Jersey of *Rankin v. Ingwersen*, 47 N. J. L. 18; also a Massachusetts case: *Delay v. Savage*, 145 Mass. 38.

We are aware that there are a few cases which hold that even if premises are dangerous when demised, the lessor is not liable to one injured thereby if the tenant in the lease covenanted to keep them in repair: *Pretty v. Bickmore*, L. R.

8 Com. P. 401. And the same principle was subsequently affirmed in a case of very similar facts: *Gwinnell v. Eamer*, L. R. 10 Com. P. 658; see also *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76, where the lessee covenanted to "make all needful and proper repairs, both internal and external." The language of the court, when taken in connection with the facts, is explainable in consonance with the early English cases before cited. See also the *dictum* in the recent case in Massachusetts, already cited, of *Dalay v. Savage*, *supra*.

But this principle has been ably reviewed in the strong opinion of Folger, J., in *Swords v. Edgar*, *supra*. This opinion declines to accept the doctrine of the above cases, for the reason that they "ignored the rule announced in *Rosewell v. Prior*, and followed and established in many cases." Folger, J., speaking for the whole court upon this question, said: "The person injuriously affected by the ruinous state of the premises demised has no right nor privity in the covenant. He is not given thereby a right of action against the lessee greater nor more sure than he had before. He has the right, without the covenant. The covenant is a means by which the lessor may reimburse himself for any damages in which he is cast by reason of his liability. But it is an act and obligation between himself and another, which does not remove nor suspend that liability. It is not so, that a person on whom there rests a duty to others may, by an agreement between himself and a third person, relieve himself from the fulfillment of his duty. Surely an ineffectual attempt to fulfill would not; as if in this case insufficient repair of the pier had been made by a builder who had contracted with the lessor to do all that was needful to make the pier secure for all comers. A covenant taken from a lessor to keep in order and repair is no more effectual than a contract with a builder to the same end. Both may afford an indemnity to the lessor, but neither can shield him from responsibility." The New Jersey case of *Rankin v. Ingwersen*, *supra*, sustains the same view. And we adopt the doctrine of the case from which we have so largely quoted as sound on legal principles and public policy.

And even if a lessee's covenant would, when broad enough in its terms, operate a relief of the lessor's liability, the covenant here would not affect the case in hand, for it is restricted and limited to "maintaining, preserving, and keeping the station-houses in as good order and repair as the same new

are, so that there shall be no depreciation in the general condition thereof at any time during the term."

The testimony as to the proximity of the awnings at the other stations had a legitimate bearing on the question of the exercise of care on the part of the plaintiff; and the defendant pursued the same line of inquiry, not only on cross-examination, but in the direct examination of its own witnesses, Stowell and Winters. We think, also, that Sawyer's testimony was legitimate.

Motion and exceptions overruled.

QUESTION OF CONTRIBUTORY NEGLIGENCE IS FOR JURY, where facts are disputed or where different inferences may be drawn from undisputed facts: See *Alabama etc. R. R. Co. v. Arnold*, 84 Ala. 159; 5 Am. St. Rep. 354.

LIABILITY FOR INJURIES ON LEASED LINES OF RAILWAY: See the note to *Singleton v. Southwestern R. R. Co.*, 48 Am. Rep. 580-582; *McMillan v. Michigan etc. R. R.*, 16 Mich. 79; 93 Am. Dec. 208, and note 227. As to liability of railroad for torts of lessee, see note to *Ohio etc. R. R. Co. v. Dunbar*, 71 Id. 295-298.

JOHNSON v. MERITHEW.

[80 MAINE, 111.]

WITNESS. — IN WRIT OF ENTRY, PLAINTIFF IS COMPETENT WITNESS who demands title in his own right as an heir at law, where he is not made a party as "heir of a deceased party": R. S. Me., c. 82, sec. 98.

PRESUMPTION OF DEATH FROM ABSENCE. — A person who leaves his home for temporary purposes, and is not heard from for the space of seven years by those who would naturally have heard from him, is presumed to be dead; but the death of such person, at any particular time during that period, is never presumed, but must be proved.

DEATH MAY BE PROVED IN CASE OF A PERSON UNHEARD OF FOR A LONG PERIOD OF TIME by showing facts from which a reasonable inference would lead to that conclusion; and the time of the death may be fixed with more or less certainty in the same manner.

PRESUMPTION AS TO SURVIVORSHIP. — Where several lives are lost in the same disaster, there is no presumption from age or sex that either survived the other; but the fact of survivorship must be proved by the party asserting it.

WRIT OF ENTRY. — Specific or undivided part of the premises, although less than that demanded, may be recovered under the Revised Statutes of Maine, chapter 104, section 10.

W. P. Thompson and R. Dunton, for the plaintiffs.

William H. Folger, for the defendant.

HASKELL, J. Writ of entry. Plea, *nul disseisin*. Both parties claim title under Margaret P. Nickerson. The tenant

claims that Margaret conveyed the premises to her son, Aaron W. Nickerson, in 1875; but demandants say that such deed is void for fraud, and inoperative for want of her capacity to make the grant, and for want of delivery.

Upon this issue, the tenant objects to the competency of Mrs. Heath, one of the demandants, because she claims to have inherited a share of the property as heir to her mother, Margaret P. Nickerson.

This objection is not well taken, for Mrs. Heath demands in her own right that which she inherited from her mother, and is not made a party as "heir of a deceased party": R. S., c. 82, sec. 98; *Higgins v. Butler*, 78 Me. 520.

It appears that in January, 1875, while on a visit to her daughter, Mrs. Heath, in Boston, Mrs. Margaret P. Nickerson was stricken with paralysis, or some kindred malady, that prostrated her bodily, and confused and unsettled her mind; that in the following March, being somewhat restored, she was taken to her home in Belfast, where she and her husband resided with their son, Aaron W. Nickerson, until her death in the following October; that ever after her illness in January she at times could not recognize her children and friends, and persisted in calling one of her daughters Aaron.

An office copy of the deed of the demanded premises from Margaret P. to her son, Aaron W., dated and recorded April 15, 1875, is set up as evidence of a conveyance of the property to him. The original is not produced, nor is any reason given for withholding it; nor is the subscribing witness, who took the acknowledgment of the deed as a magistrate, called to testify.

A mortgage of the same property is also in evidence, dated the same day, and recorded December 21, 1875, after the death of Margaret P. in the preceding October, from Aaron W. to her husband, Aaron, conditioned to secure the payment of twelve hundred dollars in installments, the last falling due in four years, and a discharge of the same is shown by the record August 28, 1876; but no other evidence is adduced upon that subject.

From a careful consideration of all the evidence, without reviewing it in detail, the court is of opinion that the supposed deed from Margaret P. Nickerson to her son, Aaron W., did not operate as a conveyance of the property to him. It has become a recognized rule in this court that, in actions at law, when the parties submit questions of fact to the determination

of the law court, they must be content with a decision of them without a review of the testimony in the opinion and reasons stated in detail.

Margaret P. Nickerson died in October, 1875, seised of the demanded premises, leaving three children, the demandants and Aaron W., to whom the same descended in undivided shares of one third each, so that the demandants became seised of two undivided thirds thereof.

The other one third descended to Aaron W., who, accompanied by his wife and three children, all under ten years of age, sailed February 3, 1880, from Troon, Scotland, in command of a vessel loaded with coal for Havana, none of whom have since been heard from.

His father, Aaron, died September 6, 1886, having quit-claimed all his interest in the demanded premises to the tenant September 11, 1880; so that if Aaron W. died before that date leaving no children surviving him, his one-third share in the same descended to his father, and passed under the latter's deed to the tenant; but if Aaron W. survived that date, then nothing passed by the father's quitclaim deed to the tenant: *Pike v. Galvin*, 29 Me. 183; *Crocker v. Pierce*, 31 Id. 177; *Coe v. Persons Unknown*, 43 Id. 432; *Walker v. Lincoln*, 45 Id. 67; *Harriman v. Gray*, 49 Id. 537; *Read v. Fogg*, 60 Id. 479; *Powers v. Patten*, 71 Id. 583; and the demandants inherited from him two thirds of his one third in the demanded premises, making their interest in the same eight ninths in all.

A person who leaves his home for temporary purposes, and is not heard from for the space of seven years by those who would naturally have heard from him, is presumed to be dead: *Wentworth v. Wentworth*, 71 Me. 72; *Stevens v. McNamara*, 36 Id. 176; *Loring v. Steineman*, 1 Met. 204; but the death of such person at any particular time during that period is never presumed, but must be proved: *Newman v. Jenkins*, 10 Pick. 515.

Death may be proved by showing facts from which a reasonable inference would lead to that conclusion, as by proving that a person sailed in a particular vessel for a particular voyage, and that neither vessel nor any person on board had been heard of for a length of time sufficient for information to be received from that part of the globe where the vessel might be driven, or the persons on board of her might be carried: *White v. Mann*, 28 Me. 361.

If death may be inferred from facts shown, it logically follows that the time of the death may be fixed with more or less certainty in the same manner: *Watson v. King*, 1 Stark. 121.

In the case at bar, the vessel, commanded by Aaron W. Nickerson, heavily laden with coal, sailed from Troon, in the south of Scotland, for Havana, a voyage usually accomplished in from twenty-five to forty days, in the track of many sailing vessels and steamers plying between the north of Europe and America.

In case of shipwreck, it is improbable, if not impossible, that the *Benj. Haseltine*, if driven ashore, should not have been reported in the United States within six months of her loss. If any on board of her had been rescued by passing vessels, they would have, within that time, sent the intelligence of shipwreck to the home port of the vessel. The circumstances surrounding the vessel and the voyage that she entered upon may well authorize the inference of her loss with all on board within the six months following the date of her departure from Scotland, and a jury would be authorized to find the death of her master and his family prior to September 11, 1880.

The weight of authority, at the present day, seems to have established the doctrine that where several lives are lost in the same disaster, there is no presumption, from age or sex, that either survived the other; nor it is presumed that all died at the same moment; but the fact of survivorship, like every other fact, must be proved by the party asserting it: *Underwood v. Wing*, 4 De Gex, M. & G. 633, affirmed on appeal in *Wing v. Angrave*, 8 H. L. Cas. 183; *Newell v. Nichols*, 75 N. Y. 78; 31 Am. Rep. 424; *Coye v. Leach*, 8 Met. 371; 41 Am. Dec. 518, and note of cases 522.

In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment; not because that fact is presumed, but because, from failure to prove the contrary by those asserting it, property rights must necessarily be settled on that theory.

In the case at bar, the father was a man forty years of age, and his minor children under ten. The last known of either was upon their sailing from Scotland. No evidence whatever gives any light upon the particular perils they encountered at death. The children are not proved to have survived their father, and therefore he died without issue, and his one third

of the demanded premises descended to his father, Aaron, prior to the date of the latter's quitclaim to the tenant, and passed to her under it.

By Revised Statutes, chapter 104, section 10, it is provided that "the demandant may recover a specific part or undivided portion of the premises to which he proves title, although less than he demanded."

Judgment for the demandants for an undivided two thirds of the premises demanded.

DEATH, HOW PROVED, GENERALLY: See note to *Wilson v. Brownlee*, 91 Am. Dec. 528-529. As to when death will be presumed, see the note to *Sprigg v. Moale*, 92 Id. 704-708; and note to *Hoyt v. Newbold*, 46 Am. Rep. 761-772.

PRESUMPTION OF SURVIVORSHIP WHERE SEVERAL LIVES ARE LOST IN SAME DISASTER: See the note to *Coye v. Leach*, 41 Am. Dec. 522-525; note to *Sprigg v. Moale*, 92 Id. 707.

DUNBAR v. DUNBAR.

[80 MAINE, 152.]

EVIDENCE OF STATEMENTS DISCLOSING ESTATE, made to probate judge under the Revised Statutes of Maine, chapter 64, section 67, is competent against party making them, in action to recover property so disclosed.

TO CONSTITUTE A GIFT *CAUSA MORTIS*, it is not only essential that delivery be complete, but possession must also be retained by the donee until the donor's death. If after delivery the donor again has possession, the gift is nugatory.

Wiswell and King, for the plaintiff.

George P. Dutton and George M. Warren, for the defendant.

DANFORTH, J. The defendant was summoned before the judge of probate for the county of Hancock, on complaint of the plaintiff as administrator, to disclose any property in his possession belonging to the estate represented by the plaintiff, under the provisions of the Revised Statutes, chapter 64, section 67. The statement then made is now offered as evidence in support of this action, which is a suit upon an implied contract to recover the money so disclosed. It is objected to as inadmissible for such purpose.

The sole object of the statute is to obtain facts known only to the party summoned, to lay the foundation for ulterior proceedings. If the person summoned is an executor or administrator, and reveals property belonging to the estate, without

further evidence he would be ordered by the probate court to add to his inventory and account for the property so disclosed: *Bourne v. Stevenson*, 58 Me. 499; *Hill v. Stevenson*, 63 Id. 365; 18 Am. Rep. 231. If any other person is cited, the jurisdiction of the probate court ceases with the disclosure, and the statement is similar to an answer to a bill of discovery, and the facts obtained may be used as evidence when applicable in any process proper to obtain the end sought: *O'Dee v. McCrate*, 7 Me. 267. Were the disclosure incompetent evidence, in most cases it could be of no possible use. As in the case at bar, the facts wanted and thus obtained are within the knowledge of no one, except the party against whom they are to be used, and can be proved only by the statement; nor does the statement furnish any means of proving them otherwise. From the necessity of the case, the defendant's disclosure must be admissible, and no doubt such was the intention of the statute. In this conclusion, however, no criminal process is included.

Whether the defendant's testimony upon the stand as a witness is admissible or otherwise, we have no occasion to inquire. He was called in his own behalf, therefore he cannot object; and the other party has no occasion to.

Can the action be maintained upon the defendant's own statements? He admits that he has or had in his possession two sums of money which belonged to the plaintiff's intestate in her lifetime. He now claims it as a gift *causa mortis*. The burden of proof is therefore upon him to show such a gift.

The defendant's statement as to the sum of one hundred dollars is, that "a few days before my mother's death she sent for me to come there and arrange for her burial. She said she had some money she wanted me to use for her last sickness and funeral expenses, and the rest was mine." Here was a sufficient recognition of the near approach of death, and possibly of an intended gift coupled with a trust, as in *Curtis v. Savings Bank*, 77 Me. 151. But the gift could not be a completed one until there was a sufficient delivery to and retention by the donee of the property in question. Upon this point the defendant says: "I received it at the time from my mother; she passed me the pocket-book, and told me of some other money, and where I could find it. A few days after, my brother and sister came to me and gave me the same pocket-book which I had accidentally left when my mother gave it to me." On cross-examination it appears that "when

mother gave it to me I simply left it right where she gave it to me," and that he received it again after her death. Whatever might have been the delivery, it is certain that the money was not retained by the alleged donee in his possession until the death of the donor. In *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec, 464, it is held that "the donee must take and retain possession until the donor's death." On page 327, in the opinion, Walton, J., says: "It not only requires the delivery to be actual and complete, such as deprives the donor of all further control and dominion, but it requires the donee to take and retain possession till the donor's death. Although the delivery may have been at one time complete, yet this will not be sufficient, unless the possession be constantly maintained by the donee. If the donor again has possession, the gift becomes nugatory. And public policy requires these rules to be enforced with great stringency; otherwise the wholesome safeguards of our testamentary laws become useless."

We are not unmindful of the fact that the defendant says that he left the pocket-book accidentally, but he also says he left it just where his mother gave it to him. It is also a somewhat significant fact that although there, as he says from one to three times a day, he does not call for it, but waits for it to be brought to him after the intestate's death. This does not seem to have been from forgetfulness, as he did obtain the other money in question left there for a time, but taken before the donor's death. Taking these circumstances into consideration, in connection with the fact that the money was not to be used until after the donor's death, and that nothing was said about a delivery or a retention when the pocket-book was passed, the conclusion is not an unnatural one that the passing of the pocket-book was for some purpose other than a delivery, perhaps that the amount might be ascertained, and that both parties understood that it was to remain in the custody of the intestate, as it evidently did. But in any view, the evidence of a delivery falls very far short of that "clear and unmistakable proof," which is required in cases of this kind.

The testimony as to the seventy-nine dollars found in the teapot utterly fails as satisfactory proof of either an intended gift or delivery. The statement does not authorize the conclusion that it was included in the money which the intestate desired the defendant to use the necessary amount of, and retain the balance. It is left then to the simple statement that

she informed him where the money could be found; but for what purpose does not appear. He there found the money, but did not take it then; afterwards he did. This taking appears to have been done, not in the intestate's presence, but whether by her direction, or even with her knowledge or consent, does not appear.

It appears that the defendant has paid certain bills for the benefit of the estate as directed by the intestate, for which he produces vouchers, amounting to fifty dollars; for these he should have credit; another of twelve dollars without a voucher, but of its payment no question seems to be made. This, therefore, may properly be allowed. The sum of these, taken from the \$179 for which the defendant is chargeable, leaves the amount of \$117 dollars now due; to this must be added interest from the date of the writ.

Judgment for the plaintiff for \$117, and interest from date of writ.

TO CONSTITUTE VALID GIFT CAUSA MORTIS, there must be delivery of possession, and the donee must take and retain possession until the donor's death: *Hatch v. Atkinson*, 56 Me. 324; 96 Am. Dec. 464; *Waynesburg College Appeal*, 111 Pa. St. 130; 56 Am. Rep. 252, and note 253, 254. The donor must part with all present control and dominion over the property: *Daniel v. Smith*, 75 Cal. 548.

LANCY v. RANDLETT.

[80 MAINE, 169.]

EQUITY HAS JURISDICTION FOR DISCOVERY AND RELIEF in proper cases touching lost written instruments.

EQUITY WITHHOLDS RELIEF IN CAUSES when the party asking it deliberately makes the mischief from which he suffers.

EQUITY. — IF THE LOSS OF A DEED IS ACCIDENTAL and without fault of the grantee, thereby subjecting his title to hazard and peril from which the law gives him no adequate relief, equity will afford that relief most suited to the necessities of the case.

BILL FOR DISCOVERY. — A COURT OF EQUITY HAVING ONCE OBTAINED JURISDICTION upon a bill containing the proper averments will retain it after discovery, and grant relief if both discovery and relief be prayed for in the bill, and this although the discovery shows the proper relief to be an award of damages that ought to be ascertained by the jury.

TO OBTAIN JURISDICTION FOR RELIEF IN EQUITY UPON THE GROUND OF DISCOVERY, THE BILL MUST AVER that the facts sought to be discovered are material to the cause of action, and that the orator has no means of proving them in a court of law, and that the discovery of them by respondent is indispensable as proof, and the want of such averment is fatal on demurrer.

AVERMENTS OF NECESSITY FOR DISCOVERY ARE NOT ESSENTIAL, AND A DEMURRER CANNOT BE SUSTAINED for the want of them, if the discovery sought be in aid of the averments of the bill, that show the cause to be one of equitable jurisdiction.

BILL OF DISCOVERY IS INSUFFICIENT for the want of equity, where it fails to show the circumstances of the loss of a missing deed, or that the loss was occasioned without the orator's fault, and a demurrer thereto for such reason will be sustained.

AMENDMENT TO BILL IN EQUITY FOR DISCOVERY will be allowed on terms.

S. C. Strout, H. W. Gage, and F. S. Strout, for the plaintiffs.

D. D. Stewart, for the defendant.

HASKELL, J. The orators ask to be confirmed in their title to land clouded by the loss of their title deed prior to its record.

The respondents demur, upon three grounds: 1. For the want of jurisdiction in equity over the subject-matter of the bill; 2. For the want of equity shown on the face of the bill; 3. Because of a plain and adequate remedy at law.

Equity jurisdiction for discovery and relief in proper cases touching lost written instruments is as old as equity itself: *Story's Eq. Jur.*, secs. 79, 84; *Whitfield v. Fausset*, 1 Ves. 392; *Blight's Heirs v. Banks*, 6 T. B. Mon. 192; 17 Am. Dec. 136; *Pomeroy's Eq. Jur.*, sec. 1376, note 3; *Campbell v. Sheldon*, 13 Pick. 8.

The bill avers more than a dozen years' undisturbed possession under the lost deed, and that the grantor has repeatedly refused to execute a new deed in its stead, and puts searching interrogatories for answer upon oath concerning the execution and delivery and loss of the missing deed; but it does not aver that the loss was not without even the culpable negligence of the orators themselves; nor does it suggest that the respondents were in any way responsible or chargeable for its loss or destruction.

Equity withholds relief in causes when the party asking it deliberately makes the mischief from which he suffers.

If the loss of a deed be accidental and without the fault of the grantee, thereby subjecting his title to hazard and peril, from which the law gives him no adequate relief, equity will afford that relief most suited to the necessities of the case: *Hord v. Baugh*, 7 Humph. 576; 46 Am. Dec. 91; *Dalston v. Coalsworth*, 1 P. Wms. 731, 733.

If the bill be for discovery, containing the averments essential to a bill of that sort, and the discovery is had showing

facts that warrant relief in equity or at law, the court having obtained jurisdiction of the cause may award such relief as proper for courts of equity to grant, if relief as well as discovery be prayed for in the bill: Story's Eq. Jur., secs. 71, 72; *Russell v. Clarke's Ex'rs*, 7 Cranch, 69. If the discovery shows the proper relief to be an award of damages that ought to be ascertained by a jury, an issue can be framed and tried in the same suit without sending the parties to an action at law: R. S., c. 77, sec. 30.

But to obtain jurisdiction for relief in equity over a cause purely legal, upon the ground of discovery, the bill must aver that the facts sought to be discovered are material to the cause of action, and that the orator has no means of proving them in a court of law, and that the discovery of them by respondent is indispensable as proof: Pomeroy's Eq. Jur., sec. 229; Story's Eq. Jur., sec. 74, and cases cited; and the want of such averment is fatal on demurrer to the bill when jurisdiction is sought in equity for discovery and relief solely upon the ground of discovery. So, if by plea in such case these facts be traversed, it would seem that the issue must be decided in favor of the truth of the bill before discovery could be decreed.

If the discovery, as in most cases, be in aid of the averments of the bill that show the cause to be one of equitable jurisdiction, then the averments of necessity for discovery are not essential, and a demurrer cannot be sustained for the want of them, but discovery must follow as a matter of course.

The orators' bill is insufficient for the want of equity, inasmuch as it fails to show the circumstances of the loss of the missing deed, or at least that the loss was occasioned without the orators' fault. For aught that appears in the bill, the orators may have designedly destroyed the missing deed for some fraudulent purpose. For this reason, the demurrer is well taken, and the exceptions must be overruled: *Hoddy v. Hoard*, 2 Ind. 474; 54 Am. Dec. 456. •Nor can the bill be maintained for discovery and relief upon the ground of discovery alone, for the necessary averments in such bill are wanting; but if the orators can truthfully amend their bill so as to come within the reasoning of this opinion, they should be allowed to do so upon such terms as the court below shall consider just.

If the deed has been lost without fault, for which the orators are in equity chargeable, it would seem that they have no plain

and adequate remedy at law. It is true that, although the deed has not been recorded, its contents may be proved by parol in an action at law: *Moses v. Morse*, 74 Me. 472; but the cloud is upon the record title, and the remedies pointed out by the learned counselor for respondents fail to heal the apparent defect of title shown by the registry of deeds. That cloud can only be removed by an appropriate decree in a court of equity.

Exceptions overruled.

EQUITY HAVING ONCE ACQUIRED JURISDICTION WILL RETAIN IT, AND GIVE FULL RELIEF: See *Whipple v. Farrar*, 3 Mich. 436; 64 Am. Dec. 99; *Bomberger v. Furner*, 13 Ohio St. 263; 82 Am. Dec. 438; *Miller v. Louisville etc. R. R. Co.*, 83 Ala. 274; 3 Am. St. Rep. 722.

BILL FOR DISCOVERY OF DEED MUST AVER MATERIALITY AND NECESSITY of the discovery: *Hosell v. Astmore*, 9 N. J. Eq. 82; 57 Am. Dec. 371.

STATE v. THOMPSON.

[80 MAINE, 194.]

EVIDENCE—HANDWRITING—PRELIMINARY QUESTION FOR THE COURT.—

Specimens of handwriting, not otherwise pertinent to the issue, may, upon being admitted or proved to be genuine, be introduced before the court and jury as a standard for comparison by which to test the genuineness of a writing in controversy; when a writing is offered in proof as a standard, the court should first find as a fact that it is genuine, and the decision of the court as to the credibility of this preliminary evidence is conclusive, unless upon a report of all the evidence it is shown to be without foundation, or based upon some erroneous application of legal principles.

STANDARD SPECIMENS OF HANDWRITING PROVED OR ADMITTED TO BE GENUINE MAY BE COMPARED BY EXPERTS in the presence of the jury, and such experts may express their opinion, founded on such comparison, as to whether the controverted paper be genuine or not.

H. H. Burbank, for the state.

Hamilton and Haley, for the defendant.

FOSTER, J. The defendant was tried upon an indictment for libel. In the trial of the case the government offered certain writings as being in the handwriting of the defendant, for the purpose of being used as a standard of comparison. Two witnesses, claiming to have seen the defendant write, and to be acquainted with his handwriting, were introduced and testified that the writings thus offered were in the handwriting of the defendant. Thereupon the court admitted them for the

purpose for which they were offered, against the defendant's objection. Afterwards, during the trial, expert testimony was introduced by the government, and these writings were used by them as a standard of comparison, to which the defendant also objected. To the ruling and decision of the court admitting the writings as a standard of comparison, and their use by experts, the defendant excepted. It is in relation to the correctness of those rulings only that any question is raised by the bill of exceptions.

The principles governing this case seem to be pretty thoroughly settled by the decisions of the court in this and other states.

The question came before the court in Massachusetts, in *Commonwealth v. Coe*, 115 Mass. 504, where it was held that before a writing can be used as a standard of comparison of handwriting, it must be proved that the specimen offered as a standard is the genuine handwriting of the party sought to be charged, and that the question of its admissibility as a standard is to be determined by the judge presiding at the trial, and so far as his decision is of a question of fact merely, it is final, if there is any proper evidence to support it; and that exceptions to its admission as a standard will not be sustained unless it clearly appears that there was some erroneous application of the principles of law to the facts of the case, or that the evidence was admitted without proper proof of the qualifications requisite for its competency.

The same question has very recently been before the court in Vermont, in the case of *Rowell v. Fuller's Estate*, 59 Vt. 688, where the court, reviewing the decisions there, says that the question has not before been authoritatively decided in that state, and lays down this rule: That when a writing is disputed, and another is offered in proof as a standard, the court should first find as a fact that the latter is genuine, and then submit it to the jury in comparison with that in controversy.

The doctrine as enunciated in *Commonwealth v. Coe*, *supra*, which is the same as that so recently settled in Vermont, has since been reaffirmed in *Costello v. Crowell*, 133 Mass. 352, and again in *Costello v. Crowell*, 139 Id. 590.

The rule in England is now the same as in Massachusetts and Vermont. For centuries, however, it was otherwise, and the English courts denied the admissibility of such testimony altogether, until 1854, when Parliament, by 17 and 18 Victoria, chapter 125, passed what is known as "the common law

procedure act," which provides that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." Under this rule, when any writing is proved to be genuine to the satisfaction of the presiding judge, it shall be admitted as a standard of comparison. By the English rule under this statute, the jury need not consider or inquire into the genuineness of the writing introduced for the purpose of comparison, as the statute obviates the necessity of any such inquiry, and makes the finding of the judge conclusive on that point.

In the light of the authorities, and the decisions in those jurisdictions where the same rule prevails as in this state in relation to proof of handwriting by comparison, we believe the rule adopted by them, upon the question by whom the genuineness of the standard is to be determined, to be the more correct and satisfactory one.

Notwithstanding that, however, there are courts of high standing, and for whose decisions we have great respect, which have adopted a different rule, and which hold that the jury should ultimately pass upon the question. Such is the rule in New Hampshire, where, as it is well understood, the doctrine of proof of handwriting by comparison has always clung more tenaciously to the conservative English common-law rule than ever appeared satisfactory to the courts of Maine, Massachusetts, Connecticut, Vermont, and some of the other states. In *State v. Hastings*, 53 N. H. 461, Sargent, C. J., speaking of the introduction of evidence to prove the genuineness of the handwriting offered as a standard, says: "It is to be received, and then the jury are to be instructed that they are first to find, upon all the evidence bearing upon that point, the fact whether the writing introduced for the purpose of comparison, or sought to be used for that purpose, is genuine. If they find it is not so, then they are to lay this writing and all the evidence based upon it entirely out of the case; but if they find it genuine, they are to receive the writing and all the evidence founded upon it, and may then institute comparisons themselves between the paper thus used and the one in dispute, and settle the final and main question whether the signature in dispute is or is not genuine."

In *Costello v. Crowell*, 139 Mass. 590, it was said that unless the decision of the judge in admitting the specimens as standards is founded upon error of law, or upon evidence which is, as matter of law, insufficient to justify the finding, the full court will not revise it upon exceptions. The same principle is laid down in *Nunes v. Perry*, 113 Id. 276, and cases there cited.

In the case before us, the testimony in proof of the genuineness of the standard came from witnesses who, if they are to be entitled to credit, were qualified to testify in relation to the genuineness of the defendant's handwriting. It was in accordance with the well-settled doctrine of this state, as laid down in *Woodman v. Dana*, 52 Me. 13, where the court, in an exhaustive and carefully considered opinion by Rice, J., reviewed the authorities, and stated, as a principle well established, that the handwriting of a person may be proved by any person who has acquired a knowledge of it, as by having seen him write, from having carried on a correspondence with him, or, as was decided in *Hammond's Case*, 2 Id. 33, 11 Am. Dec. 39, from an acquaintance gained from having seen handwriting acknowledged or proved to be his: *Page v. Homans*, 14 Me. 481; 1 Greenl. Ev., sec. 577; Wharton on Evidence, secs. 707, 709.

The New Hampshire court, in the case to which we have referred, speaking of what proof is necessary in establishing the genuineness of the standard, say that any competent evidence tending to prove that the paper offered as a standard of comparison is genuine, is to be received, whether the evidence be in the nature of an admission, or the opinion of a witness who knows his handwriting, or of any other kind whatever.

And in Vermont, in the case of *Rowell v. Fuller's Estate*, already cited, it was insisted in argument that the evidence was legally insufficient to warrant the court in admitting the standard in evidence as genuine; but the court say that while great care should be taken that the standard of comparison should be genuine, yet any evidence pertinent to the issue is admissible.

In the case under consideration, there was the testimony of two witnesses who stated their knowledge of the handwriting of the specimens offered, and that the handwriting was that of the defendant. It was upon this evidence that the court admitted the same as a standard of comparison, and for no other purpose, as stated by the court, and as the exceptions themselves show. The decision of the judge presiding was based

upon certain elements of fact, as to whether the specimens of writing were sufficiently proved to have been written by the defendant to allow them to be introduced and submitted to the jury as a standard. That fact he determined by admitting them in evidence, and allowing them to be submitted to the jury for that purpose, after the testimony of the witnesses for the government as to their genuineness. His decision must be final and conclusive, "unless it is made clearly to appear that it was based upon some erroneous view of legal principles, or that the ruling was not justified by the state of the evidence as presented to the judge at the time": *Nunes v. Perry*, 118 Mass. 276; *Jones v. Roberts*, 65 Me. 276; *Commonwealth v. Coe*, 115 Mass. 505.

The same principle applies as in determining whether or not a witness introduced as an expert is competent by his study, business, or other qualification to testify. This is a preliminary question for the court. An element of fact is involved, to be decided by the court, upon which the capacity to testify depends. Upon that question the decision of the judge, like all decisions of a similar character, is and must be, for obvious reasons, final and conclusive, unless upon a report of all the evidence bearing upon the question it is shown to be without foundation, or is based upon some erroneous application of legal principles: *Commonwealth v. Sturtivant*, 117 Mass. 187; 19 Am. Rep. 401; *Fayette v. Chesterville*, 77 Me. 33. The judge presiding is to hear and consider this preliminary evidence, and to decide whether it is credible or not; and his decision as to its credibility, like that of a jury upon questions of that kind, is conclusive: *Foster v. Mackay*, 7 Met. 538.

The evidence upon which the decision of the court was based in admitting the several writings for the purpose offered is before us, and forms a part of this bill of exceptions. This evidence, as in all cases where the discretion and judgment of the court is brought into requisition, involves so much of the element of fact that great consideration must necessarily be given to the decision of the presiding judge. We do not feel authorized from an examination of it to say that he was not warranted in admitting the writings offered, and for the purpose claimed; nor do we feel that there was any such error in the decision to which he arrived in admitting them as to call for any revision by this court upon exceptions: *Commonwealth v. Morrell*, 99 Mass. 542; *O'Connor v. Hallinan*, 103 Id. 549; *Clapp v. Balch*, 3 Me. 219.

Notwithstanding the common-law rule in England and in several of the states does not allow the proof of handwriting by comparison of hands as liberally as in Maine, Massachusetts, and Connecticut (*Moore v. United States*, 91 U. S. 273), yet it has always been the practice in these states to introduce other writings, admitted or proved to be genuine, whether relative to the issue or not, for the purpose of comparison of the handwriting. The object is to enable the court and jury, by an examination and comparison of the standard with the writing in controversy, to determine whether the latter is or is not genuine: *Hammond's Case*, 2 Me. 35; 11 Am. Dec. 39; *Chandler v. Le Baron*, 45 Me. 536; *Woodman v. Dana*, 52 Id. 13; *Homer v. Wallis*, 11 Mass. 309; *Moody v. Rowell*, 17 Pick. 490; 28 Am. Dec. 317; *Richardson v. Newcomb*, 21 Pick. 315; *Lyon v. Lyman*, 9 Conn. 55.

"For this purpose," observes the court in *Woodman v. Dana*, *supra*, "the specimens of handwriting, not otherwise pertinent to the issue, but admitted or proved to be genuine, may be introduced before the court and jury, as a standard for comparison by which to test the genuineness of the writing in controversy, and for this purpose such standard specimens may be compared by experts in the presence of the jury, and such experts are permitted to express an opinion as to the fact whether the controverted paper be genuine or not, founded upon such comparison."

The exceptions present no objections in relation to the use of the writings admitted by the court as standards, by experts, which are not fully authorized by the foregoing decision of our own court and the authorities generally: Wharton on Evidence, sec. 719, and cases cited.

No exceptions were taken to the charge of the presiding judge, and as the only questions open for consideration before this court are those presented in the bill of exceptions (*Withee v. Brooks*, 65 Me. 14), it becomes unnecessary to enter upon the consideration of the other questions urged by the learned counsel for the defendant.

Exceptions overruled.

WHETHER WRITING CAN BE PROVED BY COMPARISON OF HANDS is a disputed question: *Hanley v. Gandy*, 28 Tex. 213; 91 Am. Dec. 315. In *Morrison v. Porter*, 35 Minn. 425, 59 Am. Rep. 331, it is held that upon an issue as to the genuineness of a handwriting, papers not otherwise relevant, if proved to be genuine, may be received in evidence for the purpose of comparison. And see *Benedict v. Flanagan*, 18 S. C. 506; 44 Am. Rep. 583; *contra*, *Brace v. Cress*, 39 Ga. 544; 99 Am. Dec. 467.

ALLEY v. CASPARI.

[80 MAINE, 224.]

JURISDICTION OVER CITIZENS OF ANOTHER STATE. — When an alien or non-resident is personally present in any place in the state, however temporarily or transiently in such place, whether abiding, visiting, or traveling at the time, a process duly served upon him personally will confer complete jurisdiction over his person; and this rule may apply in Maine to a municipal court, although it be of limited jurisdiction.

W. P. Foster, for the plaintiff.

Deasy and Higgins, for the defendant.

PETERS, C. J. In a writ, returnable to the municipal court of the city of Ellsworth, a tribunal having jurisdiction in actions where not exceeding one hundred dollars of debt or damage is demanded, and the person sued is a resident of Hancock County, the defendant is described as commorant of Eden, within that county, and was arrested on the writ as he was about to remove his residence out of the state. He disputes the jurisdiction of the municipal court, upon the plea that when arrested he was not a resident of any place in Hancock County, but had his residence in Boston, in the commonwealth of Massachusetts.

We think he was a resident in Eden, in the meaning of the act creating the municipal court, while personally present there, and having at the time no permanent home or residence elsewhere in this state. Such residence as he had, all that he had, in Maine, was in Eden. His bodily presence there was, for jurisdictional purposes, equivalent to residence. His permanent domicile may have been in Massachusetts, but his domicile for the time being, his transitory domicile, was in Maine, and he was a commorant of any place where found. If it were not so, then none of our courts have jurisdiction of defendants who are non-residents of the state but are personally present within its borders; for the statutes do not provide for such cases if the defendant's theory be correct.

Story, in his *Conflict of Laws*, section 581, founds this jurisdiction of courts on the axiom laid down by Huberus, that all persons who are found in the limits of a government, whether the residence be permanent or temporary, are to be deemed subjects thereof. Wharton takes the same view of the law, citing English and American cases in its support: Wharton's *Conflict of Laws*, sec. 742. Our own reported cases have not

embraced the question, but our practice has always been in accordance with the rule stated. In Massachusetts, there are several interesting and instructive cases on the subject: *Barrell v. Benjamin*, 15 Mass. 354; *Roberts v. Knights*, 7 Allen, 449; *Peabody v. Hamilton*, 106 Mass. 217. These cases cover the ground fully. In one of them, the question arose in the police court of Boston, a court of limited jurisdiction. And in the case last cited, the court decided that a personal action of a transitory nature might be maintained against a citizen of another state, even if the plaintiff be an alien, if the defendant be personally served with process, either by summons or arrest, although the process be served on board of a foreign vessel arriving from a foreign port, and before the vessel was moored at the wharf. The defendant in that instance was described as of New York, and commorant of Boston.

The true interpretation of the principle is, that when an alien or non-resident is personally present in any place in the state, however temporarily or transiently in such place, whether abiding, visiting, or traveling at the time, a process duly served upon him will confer complete jurisdiction over his person in our courts.

Exceptions overruled.

JURISDICTION OF THE COURTS OF ONE STATE OR COUNTRY OVER CITIZENS OF ANOTHER. — It is a fundamental principle that the states of the Union are sovereign as respects the power of one to affect the citizens of another by its judgments: *Dearing v. Bank of Charleston*, 5 Ga. 497; 48 Am. Dec. 300; *Wimer v. Wimer*, 82 Va. 890; 3 Am. St. Rep. 126. Therefore state laws have no extraterritorial effect, and no state can extend its process beyond its territorial limits to subject either persons or property to its judicial decisions: *Dearing v. Bank of Charleston*, 5 Ga. 497; 48 Am. Dec. 300; *Lovejoy v. Albee*, 33 Me. 414; 54 Am. Dec. 630; *Sturges v. Fay*, 16 Ind. 429; 79 Am. Dec. 440, and note 443; *Eber v. Coffin*, 1 Cush. 23; 48 Am. Dec. 587; *Bimeler v. Dawson*, 4 Scam. 536; 39 Am. Dec. 430; *Welch v. Sykes*, 3 Gilm. 197; 44 Am. Dec. 668; or, to state the rule differently, a state court has no jurisdiction to render judgment against a person when neither he nor any property of his has been found within the state: *Lovejoy v. Albee*, 33 Me. 414; 54 Am. Dec. 630. And the suit will be abated in such case if objection to its maintenance is seasonably interposed by plea or motion: *Smith v. Eaton*, 36 Me. 298; 58 Am. Dec. 746. "No sovereignty," says Justice Story in his *Conflict of Laws*, section 539, "can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in other tribunals." And in *Piquet v. Swan*, 5 Mason, 35, 40, the same learned justice says: "The courts of a state, however general may be their jurisdiction, are necessarily confined to the territorial limits of the state. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them would be deemed

a usurpation of foreign sovereignty not justified or acknowledged by the law of nations. . . . This results from the general principle that a court created within and for a particular territory is bounded in the exercise of its powers by the limits of such territory." See also *Steel v. Smith*, 7 Watts & S. 451, where it is said, referring to the principle above enunciated, that "such is the familiar, reasonable, and just principle of the law of nations, and it is scarcely supposable that the framers of the constitution designed to abrogate it between states which were to remain as independent of each other for all but national purposes as they were before the Revolution; certainly it is not intended to legitimate an assumption of extraterritorial jurisdiction which would confound all distinctive principles of separate sovereignty." In keeping with these decisions is the case of *Latimer v. Union Pacific R'y Co.*, 43 Mo. 105, 97 Am. Dec. 378, which holds that every attempt on the part of one nation or state, by its legislature, to grant jurisdiction to its courts over persons or property not within its territory, should be regarded elsewhere as a mere usurpation, and all judicial proceedings in virtue thereof are utterly void. And it has been declared in Illinois that its courts cannot enforce the criminal or penal laws of other states: *Missouri River Telegraph Co. v. Nat. Bank of Sioux City*, 74 Ill. 217. So a passenger injured in his person while traveling in Georgia on a railroad incorporated only in Georgia, although extending to and doing business in Alabama, cannot maintain an action therefor in Alabama: *Central Railroad etc. Co. v. Carr*, 76 Ala. 388; 52 Am. Rep. 339; and it was declared in *Lovjoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630, that no judgment can be rendered against one as a trustee where neither he nor the principal defendant resides within the jurisdiction, and no property of such defendant has been found.

DECOYING PARTY WITHIN JURISDICTION. — Where, for the purpose of obtaining jurisdiction of the person, a resident of a state is induced by false representations to go to another state, where he is served with a summons, the jurisdiction so acquired by the foreign tribunal is fraudulently obtained; and that fact constitutes a good defense to an action brought upon a foreign judgment so obtained; nor is the defendant in such case guilty of any laches in failing to appear in the action in which such judgment was rendered, for the purpose of moving to dismiss the proceedings on the ground of the fraud; but the defense of fraud in acquiring jurisdiction may be properly interposed, when, for the first time, the judgment is made a legal demand against him: *Dunlap v. Cody*, 31 Iowa, 260; 7 Am. Rep. 129, and note 136. So a party decoyed from another state or country, on a promise not to sue him, may, upon being sued in violation of the promise, avoid the process, and may also bring an action for his damages by the breach of such promise: *Steels v. Bates*, 2 Aiken, 338; 16 Am. Dec. 720, and note 723. If a defendant is fraudulently induced to come within the jurisdiction of the court, the service of civil process upon him there will be set aside, although the design, when the representations were made, was to arrest him on a criminal charge, and although the defendant has made a voluntary general appearance: *Townsend v. Smith*, 47 Wis. 623; 32 Am. Rep. 793.

WAIVER OF JURISDICTION BY CITIZEN OF FOREIGN STATE. — A party may waive jurisdiction by appearing in the courts of a foreign state and pleading to the merits: *Marquez & Co. v. Le Blanc*, 29 La. Ann. 194. And in Georgia, a citizen of a foreign state can only be made a party by voluntary appearance to a suit, so as to be bound by a judgment or decree *in personam*, either by the statute or common law: *Dearing v. Bank of Charleston*, 5 Ga. 497; 48 Am. Dec. 300.

JURISDICTION OVER PERSON WITHIN A STATE WHO IS CITIZEN OF A FOREIGN STATE. — A right of jurisdiction, whether civil or criminal, will attach to all persons found within the limits of the state or government over which the power of the court extends, whether they be permanent or temporary residents, and they will, to that extent, be deemed citizens or subjects: *Molynaux v. Seymour*, 30 Ga. 440; 76 Am. Dec. 662, and note 665. And although the defendant's property is beyond the reach of the court, so that it cannot be sequestered or taken in execution, the court does not lose jurisdiction in relation thereto, if the defendant's person is within the jurisdiction: *Mitchell v. Bunch*, 2 Paige, 606; 22 Am. Dec. 669. So a transitory action may be prosecuted wherever the defendant may be found, although the subject-matter thereof may have occurred in another state, and be regulated by the laws of that state: *Hale v. Lawrence*, 21 N. J. L. 714; 47 Am. Dec. 190.

JURISDICTION OVER PROPERTY OF NON-RESIDENT. — A state has uncontrolled jurisdiction over all property, real or personal, within its borders: *Wimer v. Wimer*, 82 Va. 890; 3 Am. St. Rep. 126; *Smith v. Eaton*, 33 Me. 298; 58 Am. Dec. 746; and also has exclusive jurisdiction to settle the title to land within the limits of the state: *Farmers' Loan and Trust Co. v. Postal Telegraph Co.*, 55 Conn. 334; 3 Am. St. Rep. 53. Therefore, although a non-resident does not come within the territorial limits of a state, still if he owns property there, the courts will acquire jurisdiction which may be exercised upon such property: *Molynaux v. Seymour*, 30 Ga. 440; 76 Am. Dec. 662, and note 665. So it was decided in *Rice, Stitz, & Co. v. Petect*, 66 Tex. 568, that a non-resident can be sued in the courts of Texas when he has effects in the state, without bringing those effects before the court by attachment or some similar process, to await final judgment. And a citizen of New York may be sued in Georgia by a citizen of that state to compel a conveyance of title to land situate in the latter state for which the money has been paid and accepted: *Harris v. Palmore*, 74 Ga. 273. It was said in this case that "it would be strange, indeed, if Georgia courts had no jurisdiction to settle title to her own lands, because somebody claiming title thereto resided without her limits. . . . The result would be, that though sovereign over all her territory, though in her be the eminent domain, though her grant be the origin of all title to her lands, she could not adjudicate that title, and quiet the possession thereof in case a foreigner claimed it, however unjustly, unless that foreigner submitted voluntarily to her jurisdiction of his case. . . . Every foreigner to Georgia, in or out of the American Union, who owns land or property in this state, can be made to pay any debt he owes here out of such property. It can be attached and made to pay such debt, chases in action, or debt of any sort." So the stockholders of a foreign corporation which has been dissolved may bring a suit in West Virginia against a domestic corporation in that state to reach property held by it, but belonging to such foreign corporation: *Crumlish v. Shenandoah Valley R. R. Co.*, 28 W. Va. 623; and if a foreign corporation employ a machinist from another state to remove to Georgia and perform work for it there, the courts of that state have jurisdiction to enforce a mechanic's lien upon property of the corporation situate in Georgia: *Dahlonega Gold Mining Co. v. Purdy*, 65 Ga. 496. Again, where an act committed in Pennsylvania caused the diversion of water from a mill in Ohio, an action on the case for such injury may be brought in Ohio: *Thayer v. Brooks*, 17 Ohio, 489; 49 Am. Dec. 474, and note 476; and where a subject of Prussia becomes indebted to his sovereign by the laws of that kingdom, he may be made to answer for such indebtedness in the courts of Missouri: *King of Prussia v. Kuepper*, 22 Mo.

550; 66 Am. Dec. 639. Stockholders of a foreign corporation may not bring suit in a New Jersey court for the settlement of transactions between that and another foreign corporation which had leased its land and road, none of which, however, was in New Jersey: *Gregory v. New York, Lake Erie, etc. R. R. Co.*, 40 N. J. Eq. 38. To give a court jurisdiction, however, a real defendant against whom the plaintiff is entitled to a judgment must be found and served with process within the limits of the jurisdiction, or some property of his must be found there upon which the court can proceed *in rem*: *Latimer v. Union etc. R'y*, 43 Mo. 105; 97 Am. Dec. 378. But where a party is not within the jurisdiction of a court, a judgment rendered against him will be only effectual as a judgment *in rem*, acting upon such property as he may have within the jurisdiction: *Lovejoy v. Albee*, 33 Me. 414; 54 Am. Dec. 630. And a formal and nominal attachment of the property of a non-resident is not sufficient to give a state court jurisdiction to render a judgment against such non-resident, which will be enforced in another state: *Ever v. Coffin*, 1 Cush. 23; 48 Am. Dec. 587, and note 589. Nor does the jurisdiction of the courts of a state over property within its limits authorizing its seizure and sale according to its laws draw to such courts jurisdiction over the person of the owner residing in another state: *McVicker v. Beedy*, 31 Me. 314; 50 Am. Dec. 666.

In Kansas, a judgment determining conflicting claims of title to real estate, based upon service of process made upon a non-resident, out of the state, is treated as valid as against him: *Venable v. Dutch*, 37 Kan. 515; 1 Am. St. Rep. 260. But the tendency of the decisions in the national courts is to limit the effect of judgments against non-residents, based on service of process made out of the state, even though such judgments respect the title to real property situate within the jurisdiction of the court rendering the judgment; and if such judgment operates *in personam* merely, and does not transfer title, it will not be respected, nor permitted to operate as an estoppel in the national courts: *Hart v. Samson*, 110 U. S. 151. So it has been held that, although the state courts have jurisdiction of the property of foreigners situate within the state to subject it to the payment of debts, yet they have no power to conclude the owner's claim thereto by a judgment or decree not *in rem*, and not founded on voluntary appearance: *Dearing v. Bark of Charleston*, 5 Ga. 497; 48 Am. Dec. 300. And in case judgment is rendered against a non-resident, where jurisdiction was obtained by attachment of property within the state, and the record shows that notice of the pendency of the suit was afterwards given to the defendant by service of process upon him without the state, such judgment is of no effect outside of the state, unless the record discloses an effectual attachment: *Ever v. Coffin*, 1 Cush. 23; 48 Am. Dec. 587, and note 589.

JURISDICTION OVER LAND IN ANOTHER STATE. — A foreign court cannot, by its judgment or decree, pass the title to land situate in another country; neither can it bind such land by a judgment or decree that, in default of the defendant's conveying it, it shall be conveyed by deed of its own officers to the plaintiff: *Page v. McKee*, 3 Bush, 135; 96 Am. Dec. 201; *Wimer v. Wimer*, 82 Va. 890; 3 Am. St. Rep. 126. So "the court of one state or sovereignty has no inherent power to order lands to be sold in another state or sovereignty, or to control the title thereto": Schouler on Executors and Administrators, 2d ed., sec. 19. So it has been held that proceedings to foreclose a mortgage in the courts of the state of New York upon lands in Connecticut are without validity, and do not affect the right to a foreclosure of the mortgage according to the laws of the latter state: *Farmers' Loan and Trust Co. v. Postal*

Telegraph Co., 55 Conn. 234; 3 Am. St. Rep. 53. And the courts of New York will not entertain jurisdiction of an action brought for trespass to land outside the state: *Dodge v. Colby*, 37 Hun, 515. Nor will that state take cognizance of an action to compel an account from a trustee, under a trust created in another state, of property situate in such state, the courts of that state being competent to exercise jurisdiction: *Alger v. Alger*, 31 Id. 471. And Virginia courts have no jurisdiction to decree a partition of lands in another state, because the right to transfer, partition, and change real estate belongs exclusively to the state within whose territory it is situated: *Wimer v. Wimer*, 82 Va. 890; 3 Am. St. Rep. 126. So if the subject-matter of a suit in this state is land situated in another state, and a suit in relation thereto is pending between the same parties in such other state, and the court of that other state is in a situation to do justice to all parties, and the court in this state has not jurisdiction of all the necessary parties, it will refuse to entertain jurisdiction, but leave the parties to the decision of the court in the other state: *Harris v. Pullman*, 84 Ill. 20; 25 Am. Rep. 416. But the covenant of seisin is a personal covenant, and "as to such a covenant, a deed may be reformed" by suit brought in the state where the person resides, "although the land upon which the deed operates is situated in another state": *Bethel v. Bethel*, 92 Ind. 318, citing *Craig v. Donovan*, 63 Id. 513; *McClure v. McClure*, 65 Id. 482; *Watkins v. Holman*, 16 Pet. 25; *Brown v. Desmond*, 100 Mass. 267, and others.

JURISDICTION OVER NON-RESIDENT BY NOTICE, PUBLICATION, ETC. — A court cannot extend jurisdiction over citizens of another state by a rule of practice as to service of process: *Dearing v. Bank of Charleston*, 5 Ga. 497; 48 Am. Dec. 300. Jurisdiction over non-resident on service by publication results from the fact that he has property within the jurisdiction, and extends only to such property as was within the state when the jurisdiction attached: *Stone v. Meyers*, 9 Minn. 303; 86 Am. Dec. 104. It was held in *Quarl v. Abbott*, 102 Ind. 233, 52 Am. Rep. 662, a judgment setting aside a fraudulent transfer of corporate stock by a non-resident may be rendered upon a constructive service of process, and it is not essential that the creditor should first obtain judgment on his demand. The court, in arguing the case, declares that "it is a general principle that the process of the courts may reach and seize property within its jurisdiction. A man who brings property within the territorial jurisdiction of a state subjects it to the laws of that state. 'If a foreigner or citizen of another state,' says an able court, 'send his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects, it has the right to regulate'"; citing *Clark v. Tarbell*, 58 N. H. 88; *Ames Iron Works v. Warren*, 76 Ind. 512; *Green v. Van Buskirk*, 7 Wall. 139; *Rice v. Curtis*, 32 Vt. 460. Though it is declared in Missouri that a personal judgment obtained in a sister state upon notice to the defendant by publication only, there being no appearance of the defendant, will be deemed null and void outside the state in which it was rendered: *Laitner v. Union etc. Ry.*, 43 Mo. 105; 97 Am. Dec. 378. So in *Scott v. Noble*, 72 Pa. St. 115, 13 Am. Rep. 663, a joint action was brought in Massachusetts against A, a resident of that state, and B, a resident of Pennsylvania. Process was served on A, and the court ordered that the plaintiff give notice to B, by service of a copy of the order. B in Pennsylvania indorsed the order, "I accept service of this writ"; a judgment by default was obtained against both defendants, and the plaintiff sued B in Pennsylv-

vania on the judgment; it was decided that the Massachusetts court obtained no jurisdiction over B, and that the judgment against him was invalid.

JURISDICTION OVER NON-RESIDENT STOCKHOLDERS OF CORPORATION. — A bill in equity was brought by a corporation duly organized under the laws of Connecticut, and doing business in that state, against a corporation organized under the laws of that state and its stockholders, but having its usual place of business in Massachusetts. The bill averred that under the Connecticut laws the defendant stockholders would have been liable, as original share-holders, personally to pay for the shares of stock to which they had subscribed to the extent of the par value thereof, and this liability to pay for such face value of the stock was an asset of the corporation, and upon the insolvency of the corporation the stockholders could be made personally and directly liable for such stock. "The bill further alleged that the defendant corporation has no property whatever in Connecticut, or anywhere outside this commonwealth; that all the stockholders and officers of said company are citizens of this commonwealth; and that the plaintiff has duly demanded payment of the amount due to it, but the demand has been refused." The prayer of the bill was that the amount paid in by the defendants, also the amount of their respective deficiencies, be determined, and that the sum so due from each of them be ordered paid in. Upon demurrer the bill was dismissed. The court said: "We have heretofore in similar cases declined to pass upon and determine the relation existing between a foreign corporation and its members and the obligation arising therefrom," arguing that the liability of stockholders to a corporation is of a peculiar character, "involving the organic law by which the corporation is created, and requiring local administration": *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349. Examine also *Aultman's Appeal*, 98 Pa. St. 505; *Rice v. Merrimack Co.*, 56 N. H. 114; *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Smith v. Mutual Life Ins. Co.*, 14 Allen, 236.

FOREIGN EXECUTORS, ADMINISTRATORS, AND GUARDIANS. — It is decided in *Johnson v. Jackson*, 56 Ga. 326, 21 Am. Rep. 235, that if foreign executors or administrators come within the jurisdictional limits of a state, they are liable to be sued there by creditors, or to be brought to an account by legatees or distributees. So where an administrator appointed in Alabama, and the sureties on his bond there given, became residents of Georgia, they are liable to an action in Georgia by the distributees for a breach of the bond: *Johnson v. Jackson*, *supra*; but see *Jackson v. Johnson*, 34 Ga. 511; 89 Am. Dec. 263. And in *Ray v. Simmons*, 11 R. I. 266, 23 Am. Rep. 447, a bill in equity to enforce a trust brought against an administrator averred that the respondent, as administrator, drew a bank deposit, being the trust funds in question. The answer alleged the respondent's appointment as administrator in Massachusetts, and that, as such, he withdrew the deposit, and held the same as part of his decedent's estate. It was decided, in the absence of denial by the administrator that he held the deposit as administrator in Rhode Island, that the court would presume that he held it as administrator in that state, and would order him to account directly with the complainant, the trust having been proven. So a circuit court has jurisdiction *ratione materiae* to issue, in favor of a resident of Tennessee, an order of seizure and sale against mortgaged property in Louisiana, when it composes part of a succession in the course of administration in the probate court and is represented by an executor: *Lowry v. Erwin*, 6 Rob. (La.) 192; 39 Am. Dec. 556. But where a resident of Alabama procured a policy of insurance on his life,

through an agent residing and acting for it there, from a company chartered in New York, and died in Alabama, his executor, appointed in Alabama, may maintain an action on it there, although administration had also been granted in New York: *Equitable Life Assurance Soc. v. Vogel's Ex'rs*, 76 Ala. 441; 52 Am. Rep. 344. As to the rule where the administrator recovers judgment in his own state before suing in a foreign state, see *Freeman on Judgments*, p. 235, sec. 217. It is held in *Leonard v. Putnam*, 51 N. H. 247, 12 Am. Rep. 106, that a guardian appointed in one state cannot maintain, as such, a suit against an executor or administrator appointed in another state.

JURISDICTION AS TO SUITS BY RECEIVERS APPOINTED IN OTHER STATES.

—It is said in *Booth v. Clark*, 17 How. 322, 333, that a receiver "has no extraterritorial power of official action, nor can the court appointing him confer such authority, or enable him to go into a foreign jurisdiction to take possession of a debtor's property, nor any power which can give him, upon principles of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek." See also *Farmers' and Mechanics' Ins. Co. v. Needles*, 52 Mo. 1; *Tully v. Herria*, 44 Minn. 626; *Kronberg v. Elder*, 18 Kan. 152. In Texas, it is held that "a receiver is but an officer of the court which appoints him, and it would follow, upon principle, and which is abundantly sustained by authority, that he cannot act in his official character outside the jurisdiction of the court by which he was appointed": *Moseby v. Burrows*, 52 Tex. 396, 403; *Hunt v. Columbian Ins. Co.*, 55 Me. 290; 92 Am. Dec. 592. But in *Olney v. Tanner*, 10 Fed. Rep. 104, the court said: "Outside of the jurisdiction which appoints him, a receiver is not ordinarily entitled to maintain suits except by comity." This tendency to indicate an exception has been extended to permitting such suits, on the ground of comity, in some states: *Bank v. McLeod*, 38 Ohio, 174.

But state comity does not require courts of one state to permit receivers appointed by the court of another state to exercise privileges detrimental to the citizens of the former while pursuing appropriate legal remedies there: *Hunt v. Columbian Ins. Co.*, 55 Me. 290; 92 Am. Dec. 592; *Hurd v. City of Elizabeth*, 41 N. J. L. 1; *Johnson v. Parker*, 4 Bush, 149; *Sanders v. Williams*, 5 N. H. 213; *Bugby v. Atlantic etc. R. R. Co.*, 86 Pa. St. 261; *Pierce v. O'Brien*, 129 Mass. 314, 315; *Taylor v. Columbian Ins. Co.*, 14 Allen, 353. The rule, however, in brief has been thus stated: "Upon the question of the territorial extent of a receiver's jurisdiction and powers, for the purpose of instituting actions connected with his receivership, the prevailing doctrine established by the supreme court of the United States, and sustained by the weight of authority in various states, is, that the receiver has no extraterritorial jurisdiction or power of official action, and cannot as a matter of right go into a foreign state or jurisdiction and there institute a suit for the recovery of demands due to the person or estate subject to his receivership. His functions and powers for the purposes of litigation are held to be limited to the courts of the state within which he was appointed": *High on Receivers*, sec. 239. It is also said in the same section that "the principles of comity between nations and states which recognize the judicial decisions of one tribunal as conclusive in another do not apply to such a case, and will not warrant a receiver in bringing an action in a foreign court or jurisdiction." So it is said in *Wharton on the Conflict of Laws*, section 390 b, that "a receiver appointed in one state for an insolvent corporation has no title as such to property located

in another state," and, "that a foreign receiver cannot sue in a state court, has been held by high authority": *Id.*, note, citing *Booth v. Clark*, *supra*; *Willels v. Waite*, 25 N. Y. 577; *Insurance Co. v. Needles*, 52 Mo. 17; and it is added that it has been held that such suit may be maintained in subordination to local law, and subject to local liens, relying on the cases of *Ex parte Norwood*, 3 Biss. 513; *Hoyt v. Thompson*, 5 N. Y. 320; *Runk v. St. John*, 29 Barb. 587; *Cagill v. Woodbridge*, 8 Baxt. 580. The court in *Booth v. Clark*, 17 How. 334, which is a leading case, and of much weight upon the question of foreign receivers to sue in a state court, says: "Our industry has been taxed unsuccessfully to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor; so far as we can find, it has not been allowed in an English tribunal." The principles stated in the beginning of this note, that the several states are independent sovereignties, and foreign to each other in all matters not expressly delegated to the general government, and that its laws have no extraterritorial effect, has been modified, however, by permitting considerations of comity to intervene for the sake of justice between the states, and permitting the laws or judgments of one state to be of force and effect in another, and this principle has been applied in some states to receivers. But "the principle of comity, however, is restricted to cases where no vested or acquired rights of the citizens of the state extending such comity will be affected injuriously": *Beach on Receivers*, secs. 17, 18, citing *People v. Central City Bank*, 53 Barb. 412; *Hunt v. Columbian Ins. Co.*, 55 Me. 29; *Taylor v. Columbian Ins. Co.*, 14 Allen, 353. In *Bank v. McLeod*, 38 Ohio St. 174, 184, the right of such receiver to sue was denied by the plaintiff; but the court said (p. 183): "Independent of the rights of any citizen of Ohio, will comity allow the receiver to maintain an action in Ohio which he could bring in Kentucky? We think that upon both principle and authority such action could be maintained. The nature of the union between the states as members of a common government, the vital interests which bind them together, should lead us to presume a greater degree of comity in commercial and political affairs than we should be authorized to presume between states wholly foreign to each other." The case of *Hurd v. City of Elizabeth*, 41 N. J. L. 1, was relied on; and it is held in *Peterson v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 208, that such foreign receiver may sue in the courts of New York, although it is limited to cases where the claim does not conflict with the rights of citizens of New York.

Another authority on the point under consideration sums up the result of an examination of the cases as follows: "The powers of a receiver are co-extensive only with the jurisdiction of the court making his appointment. They do not reach the property, although movable, which is situated beyond the confines of the state; . . . he cannot sue in a different state for choses in action or for property of the debtor; . . . the receiver himself cannot, as such, pass beyond the bounds of the state to control property": *Rorer on Interstate Law*, 295. The argument in the Ohio case, *supra*, that "the power of the court to confer such authority on a receiver is not limited to property found within the state where he is appointed," and "that it is not necessary that the property should be within the jurisdiction of the court," and that the English courts have appointed receivers to manage landed property in India, Canada, and other foreign jurisdictions, is somewhat weakened, when it is considered that the court has no power of sending its officers to places beyond the jurisdiction to enforce its orders or decrees: *Cases ante*; and it has been decided in New York that, by the appointment of a receiver

in that state of a mining corporation having all its property, which consisted of real estate, in another state, the receiver obtained no title: *Simpkins v. Smith and Parmelee Gold Co.*, 50 How. Pr. 56; and in *Jones on Railroad Securities*, section 491, it is said: "Although a receiver has no extraterritorial jurisdiction, his appointment and title are recognized in other states where his claims do not come in conflict with those of citizens in the state in which adverse proceedings arise. . . . A receiver may generally sue in the courts of another state. His power to do so, however, arises from comity merely, unless there be a special statute authorizing such a suit." And a receiver has been permitted to sue upon a judgment obtained in the courts of the state within whose jurisdiction he was appointed: *Wilkinson v. Culver*, 23 Blatchf. 416; *Beach on Receivers*, sec. 685. "It sometimes happens that a person, against whom a receiver seeks his remedy in a foreign state, has, by his previous acts or dealings with the receiver, furnished a ground for a suit against him in a foreign jurisdiction, which would not otherwise have existed, as where a citizen of one state has dealt with a receiver appointed in another state, and has become indebted to him," and in such case the suit may be maintained: *Id.*, sec. 686. The case of *McAlpin v. Jones*, 10 La. Ann. 552, cited in some of the dissenting cases, to the effect that a receiver may bring suit in a jurisdiction foreign to that in which he was appointed, merely decides "that property under the control of the courts of our sister states, when feloniously or fraudulently removed from their jurisdiction and brought within ours, must, on proof of the facts, be instantly remitted by the order of our courts, and the person who, under the law of the foreign forum, is the custodian of the property, is the proper person to sue for it here." In *Chicago etc. Ry Co. v. Packet*, 108 Ill. 317, an exception to the general rule, that a receiver cannot sue in a foreign jurisdiction, is seemingly laid down as law in that state. In that case, a receiver appointed in the courts of Missouri of the defendant company took possession of a barge of the company, and chartered it to a steamer for a trip up the Mississippi River and return. It was taken into Illinois, where, being detained by the ice in the river, the barge was there given up to the receiver by the captain of the steamer chartering it, and the receiver maintained possession up to the time of the levy of the attachment, he having in the mean time endeavored to have the barge removed to St. Louis, but was prevented by the ice, and the receiver appeared as an intervenor in the attachment suit, acting upon authority to intervene by order of the court appointing him receiver; his right to interplead as a receiver under appointment of a foreign court was denied by plaintiff. The averments of the receiver's right were based upon three claims: first, the allegation of property in himself; second, of property in him as a receiver; and third, that he had possession as receiver; and an issue was raised of abandonment of the barge by the acts of leasing it, and suffering it to be taken without the state. The court sustained the claimed right to interplead, and held that there was no abandonment of the property, that the receiver was entitled to recover the same, and that the possession was good as against the Illinois attaching creditor. It would seem, however, that the logical conclusion of the reasoning of this case would be, that, since all property within the jurisdiction of the court appointing a receiver vests *eo instanti* in him for the purposes intended (*Beach on Receivers*, secs. 200, 201), that therefore, as to all such property, the receiver has at once a special property, and could maintain an action for its recovery in another state to which he removes it, no matter for what purpose.

This case, however, decides by implication that such purpose must be a

lawful one, for the court says: "The receiver was by his appointment authorized to manage the affairs of the corporation under the orders of the court. The business of the corporation was running boats on the Mississippi River, and chartering the barge for a trip up that river was but continuing the employ of the barge in the business of the corporation, and therefore making an increase of the assets to be distributed among the creditors. . . . We do not consider that there was any unlawful purpose here in the chartering and employing of the barge, as was done," — evidently an exercise of the discretion of the court for the purpose of benefiting the creditors. In addition, in this case the receiver was authorized to intervene by the court appointing him, and the right to interplead as a receiver was the main issue dependent upon whether there was such a special property in him as would sustain the claimed right, and the court declared that there was. While the decision therefore determines the main issue, we cannot see that it is an authority directly in favor of the absolute right of a receiver to sue as such in a foreign court. The analogy attempted to be made between the case of a sheriff acquiring a special property by the seizure of goods and this case, where the property was reduced to possession by the receiver after his appointment, and was in his actual possession when attached, is not of very great legal force, because an officer has no general or special property in the defendant's goods until he makes his levy: 2 Freeman on Executions, 2d ed., sec. 268; and in case of a receiver, while there is some controversy as to the time when the receiver becomes vested with the title, yet "the courts have now, as a rule, come to the conclusion that the title of a receiver, on his appointment, dates back to the time of granting the order": Beach on Receivers, sec. 200; and this resolves the question into the one before noticed, whether the goods were removed out of the court's jurisdiction by the receiver for a lawful purpose. In the case of *Pond v. Cooke*, 45 Conn. 127, 29 Am. Rep. 668, relied upon in the Illinois case, an insolvent corporation in New Jersey had contracted before its failure with a Connecticut town to build an iron bridge. The receiver appointed in New Jersey bought iron with the funds of the corporation, and shipped it to Connecticut to fulfill this contract. The iron was marked as the receiver's. The court decided that the receiver was entitled, over an attachment, to hold the iron, because he was engaged in the lawful performance of his duties, under the unfinished contract, to build the bridge. It will be observed that in this case the iron was purchased with the insolvent company's funds by the receiver himself. In *Capill v. Woodbridge*, 8 Baxt. 580, the court having jurisdiction ordered the receiver to sell the particular property in controversy, "or to ship the same to Memphis or elsewhere for that purpose, and to hold the proceeds," etc.; and it was held that the right to maintain an action for such goods "would not be lost by sending the property out of the state for sale. To this extent we would respect the orders and judgments of the courts of sister states," — a question of comity or interstate courtesy merely. It is also said in the Illinois case, "that where a legal title to personal property has once passed and become vested in accordance with the law of the state where it is situated, the validity of such title will be recognized everywhere." But it is said in *Thurston v. Rosenfield*, 42 Mo. 474, 479, 481, that "the law of one state cannot *proprio vigore* have any force or effect or territorial operation beyond its own limits, and whatever vitality it may obtain in another state is owing solely to the principle of comity. . . . Comity does not require a court to enforce a contract valid according to the laws of the place where it was made, if such enforcement would result to the manifest injury or detriment of the citizens of

the country where the property is situated or the claim attempted to be enforced"; citing several cases; see also *Rusk v. St. John*, 29 Barb. 587; *Tully v. Herria*, 44 Miss. 626; *Palmer v. Mason*, 42 Mich. 152; *Hunt v. Columbian Ins. Co.*, 45 Me. 290; *Sanders v. Williams*, 4 N. H. 213. We deduce, therefore, from a thorough examination of the cases and text-books upon the subject, that the great weight of authority is and should be in keeping with the decision rendered by Mr. Justice Wayne in *Booth v. Clark*, *supra*, that a foreign receiver has no right to sue in another state; but that, on the ground of comity, the court will, in a just and proper exercise of a sound legal discretion, permit such suits to be maintained for the purpose of thereby doing justice where the good of a larger number would demand it by recognizing the orders and judgments of the courts of a sister state. But in none of the cases is such right to sue conceded, or the suit permitted to be maintained by the foreign receiver, where the claim sought to be enforced conflicts with the rights of citizens or creditors in the state where the suit is brought.

LEVY OF PROCESS OUTSIDE OF STATE. — The sheriff of one state may not levy process issued by the courts of such state upon property situate in another state. No state "tribunal can exercise jurisdiction over persons or property within" the borders of another state: *Denny v. Faulkner*, 22 Kan. 89.

EQUITY JURISDICTION OVER NON-RESIDENTS, ETC. — It has been decided that chancery has no jurisdiction over persons of non-resident defendants, nor over their property within the state, unless given by statute, when there has been no previous judgment at law within the state: *Zecharie v. Bowers*, 1 Smedes & M. 584; 40 Am. Dec. 111. But a court of equity may obtain jurisdiction where defendant's person is within jurisdiction: *Mitchell v. Bunch*, 2 Paige, 606; 22 Am. Dec. 669; *Carroll v. Lee*, 3 Gill & J. 504; 22 Am. Dec. 350; and where the defendant is within the state, but the land or other property claimed is without, the chancellor has jurisdiction, although the proceeding is *in rem*: *Carroll v. Lee*, 3 Gill & J. 504; 22 Am. Dec. 350. So jurisdiction in equity may be upheld whenever the parties, or the subject, or such a portion of the subject, are within the jurisdiction, that an effectual decree can be made and enforced, so as to do justice between the parties: *Ward v. Arredondo*, 1 Hopk. Ch. 213; 14 Am. Dec. 543; and non-residents may maintain a suit in chancery against non-resident defendants, provided there is one resident defendant: *Comstock v. Rayford*, 1 Smedes & M. 423; 40 Am. Dec. 102. A court of equity also has jurisdiction to enforce the performance of contracts made in another country by foreigners actually domiciled or temporarily residing in the state where the jurisdiction is sought at the time of the service of process: *Mitchell v. Bunch*, 2 Paige, 606; 22 Am. Dec. 669; *Ward v. Arredondo*, 1 Hopk. Ch. 213; 14 Am. Dec. 543; and such court in one state having acquired jurisdiction over the persons of the parties may enforce a trust or the specific performance of a contract in relation to land situate in another state: *Burnley v. Stevenson*, 24 Ohio St. 474; 15 Am. Rep. 621. So where relief was sought on the ground of fraud, it was held in New Jersey that the courts of that state would, by injunction, restrain the payment of the proceeds of the sale of mortgaged property made there by the sheriff under process of its courts, although both parties were non-residents: *Tomeon v. Tomeon*, 31 N. J. Eq. 464. As to the jurisdiction of a court of equity to deal with land outside the state, see *Piedmont Coal etc. Co. v. Green*, 3 W. Va. 54; 93 Am. Dec. 799, and note 803.

FOR TRESPASS ON HIGH SEAS. — It is decided in *Wilson v. Mackenzie*, 7 Hill, 86, 42 Am. Dec. 51, that a state court has jurisdiction of a trespass

committed on the high seas by a naval officer assaulting, beating, and falsely imprisoning a subordinate on board a United States war-vessel in the alleged exercise of naval discipline.

JURISDICTION OVER ALIEN ENEMY. — It was declared in 1883, in West Virginia, that "in a war between independent nations, an alien enemy resident in the country may sue and be sued as in time of peace," but such doctrine "has no application to non-resident enemies or enemies resident in the enemies' country absent from the country in which the suit is brought, nor can it have any application in a civil war such as our late war, because in such war there can be no alien enemies. . . . Necessarily, therefore, and according to all the authorities, one belligerent cannot, in the courts of his country or section, sue his enemy resident in the hostile country or section where he cannot be legally reached by the process of the court": *Haymond v. Camden*, 22 W. Va. 180, 203.

GARNISHMENT OF NON-RESIDENT'S PROPERTY. — The property of a non-resident in the hands of another may be reached by garnishment, the property as well as the garnishee being within the jurisdiction of the court: *Molyneux v. Seymour*, 30 Ga. 440; 76 Am. Dec. 662.

McGLINCHEY v. FIDELITY AND CASUALTY Co.

[80 MAINE, 251.]

TERMS OF ACCIDENT INSURANCE POLICY SHOULD BE LIBERALLY INTERPRETED in favor of assured.

ACCIDENT INSURANCE — CONSTRUCTION OF TERMS OF POLICY. — Where the terms of an accident policy require proof that death was caused "by bodily injuries effected through external, violent, and accidental means," recovery may be had, although death was produced by a ruptured blood vessel about the heart, caused either by fright or resulting from extraordinary mental or physical exertion put forth by the deceased to save himself from injury when in imminent peril brought about by accident.

Id. — Where policy declares that insurance "does not extend to any bodily injury of which there shall be no external and visible sign upon the body of the insured," and also that it shall not cover "any death caused" in certain ways named, the former clause is only applicable to injuries not resulting in death.

A. McNichol, for the plaintiffs.

N. and H. B. Cleaves, and E. B. Harvey, for the defendant.

PETERS, C. J. The plaintiffs, who are minor children, sue for one thousand dollars, an amount insured in an accident policy on the life of their father by the defendant company. The circumstances of the father's death were these: On a morning, while a resident of Calais, he was driving in a covered carriage, containing himself and his two small boys, on the principal public way in St. Stephen, New Brunswick, when his horse, frightened at a load of hides passing on the

same way, suddenly sprang into a run, first jumping to the side of the way, and nearly colliding with other teams, and ran a considerable distance before he was brought under control. The result was, that there was no collision, nor was the carriage upset, or any one thrown therefrom. Immediately afterwards the insured experienced great sickness and pain, and, going directly to his house, died in about an hour from the moment of the accident. He was in good health on that morning, before the accident, and there is no suggestion that he was not a person of generally sound and strong constitution. His business was that of a commercial traveler. The case is reported for our determination upon the law and facts.

We think, on these facts, that the common judgment of men would instinctively declare, irrespective of the refinements which are often indulged in over primary and secondary causes, that here was a plain accident causing death, and that the company should pay the sum promised in the policy. In any reasonable view that can be taken of the series of happenings, our minds go to the same conclusion. We believe that the common-sense view is also the legal view.

The company insures against death by accident. And as, in some cases, it is difficult to determine whether the death is caused by disease or by accident, in order to prevent fraud or mistake the company provides its own tests by which the fact shall be ascertained. The leading provision of the policy is, that those interested in the insurance, in order to establish the liability of the company, shall prove that death was caused "by bodily injuries effected through external, violent, and accidental means," within the meaning of the contract. The company having chosen its definition of liability, and having the opportunity of annexing conditions which, usually, are not closely observed by persons accepting insurances, the meaning of the terms employed need not be enlarged or restricted for the benefit of the company, but should be liberally interpreted in favor of the insured.

Was the death in this instance caused by bodily injuries effected through external, violent, and accidental means? Certainly there was an accident. The definition of accident, generally assented to, is an event happening without any human agency, or if happening through human agency, an event which, under the circumstances, is unusual and not expected to the person to whom it happens. This definition exactly fits the facts here. Argument cannot be necessary to satisfy any

one that the injury happened by violent means. A well man suddenly meets a perilous emergency which taxes all his physical and mental strength, and his death is caused thereby in an hour.

The greater question is, whether the death was caused by external means. We have no doubt it was. And really all the questions of the case may be resolved into the single inquiry as to what was the real cause producing death. And here a question of fact must to some extent be determined. The testimony is meager. Possibly the counsel for the plaintiffs relies on the preliminary proofs of loss as evidence in chief, which are fuller than the general testimony, but that is not allowable. Leaving the proofs of loss to serve only the proper purpose for which they could be introduced, all the evidence we have, more than the facts already stated, is, that the insured became deathly sick, and after death a discoloration appeared on the surface of the body in the region of the heart. There is no pretense that the body bore any marks of contact with anything inflicting injury, or that it came in contact with any physical object during the time of the accident. Our belief is, on the facts legitimately before us, that death was produced by a ruptured blood vessel about the heart, and that such rupture was caused by the extraordinary physical and mental exertion which the deceased put forth to save his children and himself from injury. The physical strain and mental shock was more than he could bear. In this calculation of the facts, we come easily to the conclusion that, as between these parties, physical and external causes effected the death. The misconduct of the horse, and inseparably connected therewith the conduct of the man on the occasion, in his effort to avoid the threatened catastrophe, brought death.

The defendants, however, do not agree to this version of the facts. They contend that death was produced purely by fright, and not by the aid of any physical means whatever, and that the means through which death was produced must be considered as internal only. But if it is to be admitted that death was caused through fright, even then we are just as strongly convinced that it was also caused by external means. Whether one thing or another shall be considered the proximate cause depends upon the relation of the parties to the suit with each other, as well as upon other circumstances. If the death be laid to fright, it must be because fright produced bodily injury, and the means which produced fright were external.

It is impossible to impute the death to fright without an explanation of the circumstances or situation which produced the fright. Suppose any person inquires of another what caused the death of a friend, and the answer be that he died from fright, would the question be more than half answered? Would not the inquirer immediately and instinctively ask the cause of the fright? In most conditions, and in almost every sense, fear is an effect of something merely. There must be some active cause behind it.

In the present case it was no more than an agency through which the accident acted. It was a dependent and not independent factor in the series of operating forces. It was no more the real cause of the death than a hammer in the hands of a workman, who strikes a blow with it, is the cause of such blow. The efficient, true cause, dominating all other causes in the combination, was the misbehavior of the running horse. Subsequent occurrences were merely the instrumentalities through which the real cause spent its force. The act of the horse was the beginning, death was the end.

The authorities are helpful to this view, though perhaps not exactly *appropos* or decisive. A person pushed into a river may be able to swim, and, if in full possession of his faculties, to save himself; but if, in the confusion and terror of the moment, he loses his self-command and is drowned, the person thrusting him in the water is liable for the consequences: Wharton on Negligence, sec. 94. A man with an ax chased a boy, who, in his fright, ran into a store against a barrel of wine, breaking the barrel. The man was held responsible for the loss of the wine: *Vandeburgh v. Truax*, 4 Denio, 467; 47 Am. Dec. 268. A person is liable *civiliter* for blandishing a gun for the purpose of scaring another: *Beach v. Hancock*, 27 N. H. 223; 59 Am. Dec. 373. And is liable *criminaliter* for the same thing: *Commonwealth v. White*, 110 Mass. 407. Where, by a defendant's negligence, his horse ran into another's sleigh and frightened his horses, causing them to run into the plaintiff's sleigh, it was held that the defendant was liable: *McDonald v. Snelling*, 14 Allen, 290; 92 Am. Dec. 768. A woman, fearing she would be run over by an express wagon carelessly driven, jumped against the wall of a building and injured her face. The act of the express company, by its agent, it was held caused the injury: *Coulter v. American Express Co.*, 56 N. Y. 585; see *Page v. Bucksport*, 64 Me. 51; 18 Am. Rep. 239, and cases there cited. It will be observed that in these cases,

and there are many others that fall within the same classification, the results are predicated upon the idea that where an accident arises from the fright of a person, the injury flowing from it is imputable to causes producing the fright.

Then there are cases more directly touching the question as to whether the injuries in the case at bar were produced by external means or not. It has been held that an insane man who takes his own life dies from an injury produced by external, accidental, and violent means: *Accident Ins. Co. v. Crandal*, 120 U. S. 527. Same result follows when death ensues from accidental drowning: *Trev v. Assurance Co.*, 6 Hurl. & N. 845; *Winspear v. Accident Ins. Co.*, 6 Q. B. Div. 42. Accidentally inhaling coal-gas, causing death, entitles a recovery upon a policy like the present: *Paul v. Travelers Ins. Co.*, 45 Hun, 318. A death from blood-poisoning, produced by virus communicated to the hand by a fly, comes within the terms of such a policy: *Bacon v. United States Mut. Accident Ass'n*, 44 Hun, 599. The latter case has been criticised upon the point whether the means in that instance were violent or not. In *Insurance Co. v. Burroughs*, 69 Pa. St. 43, the court says: "If the injury be accidental and the result is death, what matters it whether the injury is caused by a blow from a pitchfork or from a strain in handling it." In these cases it was held that the true cause of the death came from the outside,—were external means. Upon principle, we think the same decision must be reached here.

Another point of defense is taken. By a subsidiary, conditional clause in the policy, it is provided that the insurance "does not extend to any bodily injury of which there shall be no external and visible sign upon the body of the insured." This does not apply to fatal injuries, but only to those not resulting in death. It would be utterly unjust if this condition applied in cases of death. It would preclude recovery in all instances where death occurs by drowning, freezing, poisoning, suffocation, concussion,—means of death leaving no outward mark,—and also where the insured has been killed, and his body is missing. The context shows that the clause is only applicable to injuries not resulting in death. The policy declares that the insurance shall not extend to bodily injuries unless the external sign of injury is visible, "nor to any death caused" in certain ways named. There are reasons for the condition applying to a surviving claimant. He has unusual chance for feigning an internal injury, if disposed to defraud

the insurers. But no such protection is required where the accident causes death. The dead body is external and visible sign enough that an injury was received: *Mallory v. Travelers Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410; *Paul v. Travelers Ins. Co.*, 45 Hun, 818.

Defendants defaulted.

THE CASES UPON THIS POINT are all cited in the opinion of the court, and the leading case, *Frew v. Assurance Co.*, 6 Harl. & N. 845, is printed as a note in 7 Am. Rep. 410.

BLISS v. WINSLOW.

[80 MAINE, 274.]

IN ACTION FOR CONVERSION AGAINST OFFICER WHO HAD ATTACHED YACHT FOR CREDITOR OF SELLER, IT IS NO DEFENSE THAT SAME WAS UNLAWFULLY PURCHASED by the plaintiff, an inspector of customs, contrary to the Revised Statutes of the United States, section 2638, which provides, under a penalty, that no person in that branch of public service shall "own any vessel, or interest therein." The plaintiff's possession was his title against the officer.

ACTION for conversion of yacht of plaintiff, attached and sold by defendant as deputy sheriff under claim in favor of a creditor of the seller. The other necessary facts are sufficiently stated in the opinion.

H. Bliss, Jr., for the plaintiff.

William H. Hilton, for the defendant.

PETERS, C. J. This case falls outside of the class of cases in which a redress for injuries upon personal property is denied by the law upon considerations of public policy. It may be near the line of such cases.

The plaintiff, at a time when he was an inspector of the public customs, became the owner, by purchase, of a boat, notwithstanding the law (R. S. U. S., sec. 2638) provides that no person in that branch of the public employment shall "own any vessel, or interest therein," under a penalty of five hundred dollars. The plaintiff supposed that his boat or yacht did not come within the prohibition of the law. But we are inclined to think it did, and we will take it for granted that it was so.

We do not conceive it to be an answer to an action for the conversion of the boat that the trespasser was at the time of the conversion an officer attaching the property for a creditor of the seller, upon the claim and theory that no property passed by the sale. The seller's property was not diminished

by the sale. He received a full consideration, merely exchanging property for property. No fraud upon creditors was accomplished or intended.

The statute itself is unlike any other prohibitory legislation, being bare of any executory or explanatory provision. Suppose an owner of vessels becomes a public officer while he is such owner, what becomes of the property owned by him? Can it be regarded as lost or abandoned, to be appropriated by any finder? Suppose the boat had been purchased to be at once broken up for its old wood and iron, or to be immediately converted into some form of property other than a boat, and such intention had been executed, would the purchase have been in such case unlawful?

But these queries, although perhaps helpful indirectly, are rather at a distance from the point on which we place the decision of the case. There is considerable difference of judicial opinion on questions affected by the doctrine of public policy, and the present occasion does not require a discovery or discussion of the true rules to be generally applied to them. Suffice it to say that we think the present case may be saved to the plaintiff by force of the decision in *Hamilton v. Goding*, 55 Me. 419, where it was held that an owner of intoxicating liquors, although such liquors were intended for sale by him in violation of law, may maintain trespass for their unauthorized conversion by a sheriff, who is at the time acting under color of office in service of civil process.

Upon principle, that case and this are alike. There, as it is here, the officer attached the goods as the property of the seller. There the possession of the articles held for illegal purposes was enough to found the plaintiff's action upon. It did not lie in the officer's mouth to allege that the possession was for unlawful purposes. We think the same rule applies here. The plaintiff's possession was his title, in a conflict with the officer who represented neither possession nor any right to possession: *Adams v. McGlinchy*, 66 Me. 474; see *National Bank v. Matthews*, 98 U. S. 621.

Exceptions overruled.

PENALTIES. — In *National Bank v. Matthews*, 98 U. S. 621, it was held that a national bank not authorized to loan money on real estate, having loaned money on a note, with a deed of trust as security, was entitled to enforce the collection of the note by a sale of the lands, the penalty being by way of forfeiture of the charter rather than by setting aside a contract. Where a statute imposes a penalty on an officer for solemnizing marriage under certain circumstances, the marriage may be held valid, the penalty attaching to the officer: *Milford v. Worcester*, 7 Mass. 48; *Parton v. Hovey*, 1 Gray, 119.

BRAY v. CLAPP.

[80 MAINE, 277.]

IT IS A SUFFICIENT JOINDER OF A HUSBAND IN HIS WIFE'S DEED of her property derived from him, for him to express his assent under his own hand and seal, without being in any other manner a formal party thereto.

A. H. Ware, for the plaintiff.

Walton and Walton, for the defendant.

PETERS, C. J. It is conceded that the plaintiff is entitled to recover upon the case submitted, if it be a sufficient joinder of a husband in his wife's deed, of her property derived from him, for him to express his assent, under his own hand and seal, without being in any other manner a formal party thereto.

The statute (R. S., c. 61, sec. 1) provides that "real estate directly or indirectly conveyed to a wife by her husband, or paid for by him, or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband." We have heretofore given what we regard as convincing reasons why this statute should be liberally construed for the sake of upholding honest conveyances: *Perkins v. Morse*, 78 Me. 17; 57 Am. Rep. 780.

In the case now before us, the deed is in ordinary form, as a conveyance by the wife, the name of the husband appearing only in the final clause, in the words that follow: "In witness whereof, I, the said Emeline Houghton, and Jonah Houghton, in token of his assent to this conveyance upon the terms of and subject to the limitations aforesaid, of the aforesaid premises, have hereunto set our hands and seals this fourth day of November, A. D. 1880." Each of them signed and sealed the instrument.

In order to ascertain whether this expression of assent by the husband is a joinder in the wife's deed, within the meaning of the statute requiring a joinder, it is necessary to appreciate the purpose of the requirement, and see what is to be accomplished by it. The design of the law no doubt was, that a married woman shall not improvidently deed away property given her by her husband or his friends, or shall not without some right of hindrance in the husband, convey real estate which she presumably, in some way or to some extent, holds for their common use and benefit.

Is not the object completely attained by requiring merely his written assent in her deed? Is she not thus effectually prevented from making any valid conveyance by merely her

own unaided act? The statute exacts the "joinder of her husband," not as a grantor, because he has nothing to grant, but as an assenter merely, for he has only the power to withhold or give his assent. He joins in the deed, not to convey or assist in conveying anything, but to assent that she may convey her own title. The only possible right which he has in her lands is that of dissenting from her conveyance, and that he waives by assenting to it. The word "joinder" implies that the assent is to be expressed in writing in her deed. What possible public policy can the statute subserve, by requiring the husband, in his wife's deed when it is one of warranty, to commit himself to a warranty of property which he does not own, and for a transfer of which he receives no part of the consideration? by requiring the idle assertion that he is seised of the premises, when he is not? or in requiring the other untruthful statements which his covenants would contain? In some of the states the statutory provision is, that her deed must be made with "his assent," or "written assent." No more than written assent was really intended by our own statute, the difference in phraseology being but accidental, and not essential.

An appeal to the common-law rules does not weaken the argument, because they are inapplicable. The reason why a husband, under the common-law way, joined in the wife's deed, was, that they were both seised of her real estate, he of a freehold and she of a fee therein. They were regarded in the old law as one person, the legal existence of the wife being consolidated into that of the husband. They were therefore required, in matters affecting her, to join in pleading and in conveyances. Those rules, under our statutory system, are obsolete.

The authorities differ somewhat on this question of joinder. We think the best reasoned judicial expressions on the subject are in accord with the views accepted by us. A clear and very satisfactory decision on the point, where the discussion is full, is in *Woodard v. Seaver*, 38 N. H. 29. In that case the court says that the deed there in question would be wholly void without the joinder of the husband, and it was held that his written assent in the deed was a joinder. *Evans v. Summerlin*, 19 Fla. 858, is a pointed case favoring the same view of the question.

Exceptions overruled.

JOINER OF HUSBAND. — See *Schouler on Husband and Wife*, sec. 269, citing *Burns v. Hayburger*, 8 Jones, 76; *Warner v. Peck*, 11 R. I. 431; *Friedland v. Mullen*, 10 Heik. 226.

HODGES v. HEAL.

[80 MAINE, 281.]

ORAL EVIDENCE IS ADMISSIBLE FOR THE PURPOSE OF SHOWING THAT THE CONSIDERATION FOR A DEED OF LAND by contemporaneous verbal agreement also settled a trespass previously committed by the grantee upon the land.

ETHER OF TWO TENANTS IN COMMON MAY RELEASE OR COLLECT A CLAIM FOR DAMAGES for trespass upon the estate; such damages are common to both estates, and belong to them jointly.

THE trespass complained of was the cutting and hauling by defendants of a large quantity of wood from land of the plaintiffs.

W. P. Thompson and R. F. Dunton, for the plaintiffs.

William H. Fogler, for the defendants.

PETERS, C. J. The case, unencumbered by immaterial statement, comes to this: The defendants, having committed a trespass upon the woodland of the plaintiffs, tenants in common, purchased the interest of one of the plaintiffs in the land, giving, according to a receipt, \$375 therefor. Now, are the defendants permitted to show that the consideration of the receipt, the \$375, not only paid for the interest in the land, but by contemporaneous verbal agreement also settled the trespass previously committed by the defendants upon the land.

The question touches very closely the principle which prohibits the reception of oral evidence to change the effect of a written contract. Still, we think the evidence offered was admissible on the theory advanced in the case of *Farrar v. Smith*, 64 Me. 74, that it affects merely the amount of consideration paid, and not the substance of the contract. It allows evidence to show that the real consideration paid for the land was less than stated, and that the whole sum was really paid for the land and something besides. In the case cited, the consideration in the deed was paid for the farm, and something in addition not named in the deed. A consideration may be proved to be either more or less than the sum stated in a deed or other written contract. The principal contract is not varied, but is made to be the groundwork or consideration of another contract. It is not unlike the case of a lumberman buying land, inclusive of the timber already cut down upon it by him, or of a tenant buying a house in which he lives, inclusive of rent for past occupation, the deed in

own unaided act? The statute exacts the "joinder of her husband," not as a grantor, because he has nothing to grant, but as an assenter merely, for he has only the power to withhold or give his assent. He joins in the deed, not to convey or assist in conveying anything, but to assent that she may convey her own title. The only possible right which he has in her lands is that of dissenting from her conveyance, and that he waives by assenting to it. The word "joinder" implies that the assent is to be expressed in writing in her deed. What possible public policy can the statute subserve, by requiring the husband, in his wife's deed when it is one of warranty, to commit himself to a warranty of property which he does not own, and for a transfer of which he receives no part of the consideration? by requiring the idle assertion that he is seised of the premises, when he is not? or in requiring the other untruthful statements which his covenants would contain? In some of the states the statutory provision is, that her deed must be made with "his assent," or "written assent." No more than written assent was really intended by our own statute, the difference in phraseology being but accidental, and not essential.

An appeal to the common-law rules does not weaken the argument, because they are inapplicable. The reason why a husband, under the common-law sway, joined in the wife's deed, was, that they were both seised of her real estate, he of a freehold and she of a fee therein. They were regarded in the old law as one person, the legal existence of the wife being consolidated into that of the husband. They were therefore required, in matters affecting her, to join in pleading and in conveyances. Those rules, under our statutory system, are obsolete.

The authorities differ somewhat on this question of joinder. We think the best reasoned judicial expressions on the subject are in accord with the views accepted by us. A clear and very satisfactory decision on the point, where the discussion is full, is in *Woodard v. Seaver*, 38 N. H. 29. In that case the court says that the deed there in question would be wholly void without the joinder of the husband, and it was held that his written assent in the deed was a joinder. *Evans v. Summerlin*, 19 Fla. 858, is a pointed case favoring the same view of the question.

Exceptions overruled.

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HODGES v. HEAL.

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W. P. Thompson and R. F. Dunton, for the plaintiffs.

William H. Fogler, for the defendants.

PETERS, C. J. The case, unencumbered by immaterial statement, comes to this: The defendants, having committed a trespass upon the woodland of the plaintiffs, tenants in common, purchased the interest of one of the plaintiffs in the land, giving, according to a receipt, \$375 therefor. Now, are the defendants permitted to show that the consideration of the receipt, the \$375, not only paid for the interest in the land, but by contemporaneous verbal agreement also settled the trespass previously committed by the defendants upon the land.

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either case not mentioning that the consideration was paid for anything but the land. In such cases, it only affects the amount of the consideration, to be permitted to prove by oral evidence that the indebtedness for stumpage or occupation was also settled in the principal transaction.

The plaintiffs contend that, being tenants in common, the interest of the two in the lumber cut by the trespass could not be settled or released by one. That is incorrect. Either could collect or release the claim. Though their estates are several, the damages are one, so to speak, are common to both estates, and belong to them jointly: *Bradley v. Boynton*, 22 Me. 287; 39 Am. Dec. 582; *Kimball v. Sumner*, 62 Me. 305, 810.

Exceptions overruled.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT THE CONSIDERATION OF A DEED embraced the payment of encumbrances and other claims: See *Buckley's Appeal*, 48 Pa. St. 491; 88 Am. Dec. 468.

RELEASE BY ONE OF SEVERAL CO-TENANTS. — "The general rule, sanctioned at least by all the early and most of the late authorities, is, that whenever the cause of action existing in favor of any number of co-tenants is joint, the release by one bars an action by the others. And it seems that in all personal actions 'tenants in common may have such actions personal, jointly in all their names, as of trespass, or of offenses which concern their tenements in common, as for breaking their houses, breaking their closes, feeding, wasting, and defouling their grass, cutting their woods, for fishing in their piscary, and such like. In this case, tenants in common shall have one action jointly, and shall recover jointly their damages, because the action is in the personality, and not in the realty.' Therefore, an action for trespass on their land, being strictly personal, may be barred by a release from either of the co-tenants. It is said a failure to interpose the release by way of plea in abatement is of no consequence": Freeman on Cotenancy and Partition, sec. 179; *Austin v. Hall*, 13 Johns. 286; 7 Am. Dec. 376, and note; *Kimball v. Wilson*, 3 N. H. 96; 14 Am. Dec. 342; *Bradley v. Boynton*, 22 Me. 287; 39 Am. Dec. 582.

WHITTEMORE v. RUSSELL.

[80 MAINE, 297.]

PAROL EVIDENCE ALIQUIDE THE WILL is admissible for the purpose of showing that certain of the testator's children, who did not receive anything under the will, were intentionally omitted.

CONSTRUCTION OF WILL — LIFE ESTATE — AUTHORITY TO SELL. — A wife takes only a life estate in the realty, with a gift over, under a clause of a will which provides as follows: "I give to my wife the use and remainder of my property, both real and personal, during her natural lifetime, and after her decease it is to be equally divided between my children; the real estate to be sold, if thought advisable"; and the last

clause, providing for a sale of real estate, is not effective, no power of sale having been conferred by the testator on the executor or any trustee, but the land can be sold only by the persons to whom it belongs.

WILL—WHETHER GIFT OF PERSONAL PROPERTY FOR A LIFETIME, WITH A GIFT OVER, IS ABSOLUTE OR OTHERWISE depends upon the nature of the property, as to its being perishable, or merely of articles which may depreciate by using, and also upon other circumstances. Where the use of money is given, the gift is of the interest only, and security must be given, or a trustee appointed, of whom a bond would be required. All rules may be changed, according to circumstances, as a court of equity may deem proper.

J. C. Holman, for the plaintiff.

S. Clifford Belcher, for the defendants.

PETERS, C. J. In this amicable proceeding to obtain a judicial construction of the will of John Whittemore, the first question encountered is one of fact, which is, whether those of the testator's children who do not receive anything under the will were intentionally omitted or not. The depositions in the case establish beyond doubt that the omission was intentional, and founded on good reasons.

The question of law which attaches to this branch of the case is, whether such intention may be shown by evidence *aliunde* the will, in connection with the internal evidence exhibited by the will itself. We cannot doubt that parol or oral evidence is admissible for such purpose. The evidence does not contradict the will in any way, but on the contrary, confirms it. It relates to a point to be established under the statutes, and not under the will. The section of the statute referred to (R. S., c. 74, sec. 9) declares that the will shall not be affected by the omission, if intentional, or if not occasioned by mistake, or if the omitted child had received a due proportion of the estate during the life of the testator. Surely, those matters are, in most cases, provable only by oral evidence. The authorities generally favor this exposition of the law, and it has been always practiced upon in this state, as far as we know, as an unquestioned principle: 1 Redfield on Wills, 298; Schouler on Wills, sec. 21; *Wilson v. Fosket*, 6 Met. 400; 39 Am. Dec. 736. The testator gave his reasons to his family for his intended action in that respect. Of course, if oral evidence be admissible, his own declarations may be proved: *Converse v. Wales*, 4 Allen, 512.

Differences exist among the parties as to the legal effect of the principal provision in the will, which is this: "I give to my wife the use of the remainder of my property, both real

and personal, during her natural lifetime, and after her decease it is to be equally divided between my children; the real estate may be sold if thought advisable."

It is clear that the wife takes only a life interest in the realty, for it is expressly so provided, with a gift over. Words would fail of all sensible meaning to determine otherwise: *Stuart v. Walker*, 72 Me. 145; 39 Am. Rep. 311, and cases there cited; *Copeland v. Barron*, 72 Me. 206; the will in *Warren v. Webb*, 68 Id. 133, a case relied on by the counsel for the widow in the present case, differs from this will, and that case stands well on the verge of the law in testamentary construction.

The meaning of the clause providing that "the real estate may be sold, if deemed advisable," is invoked by the bill. Probably the testator failed fully to express his idea. The words must be taken as they are. The land can be sold only by the persons to whom it belongs. No power of sale is conferred by the testator on the executor or any trustee. *Si voluit non dicit*. The life estate may be possessed and controlled by the wife, or she can sell it. It is her absolute property. And the reversion may be sold by the heirs; or all interested parties can join in selling the property, dividing the proceeds of sale according to their interests therein.

A gift of the use of personal property for a lifetime, with a gift over, as it is here, is to be regarded according to the nature of the property, and other circumstances. If of perishable articles, the use of which consists in their consumption, it amounts from necessity to an absolute gift of the property. If of articles which may depreciate by using, but which will not necessarily be consumed or worn out in that way, a full title thereto is not given; but the life legatee, under ordinary circumstances and risks, is allowed to retain possession of the articles without giving security for their preservation. Circumstances may, however, alter the case as to such property. Where the use of money is given, the gift is of the interest only; and as such property may be easily lost or wasted, the general rule is, that the legatee must give some reasonable security to safely preserve the funds for the remainderman, or the money may go into the hands of a trustee, of whom a bond would be required. And all these general rules are allowed to bend to the force of circumstances, and may vary, or be dispensed with even, according to amounts, situations, wants, and such probabilities and possibilities as a court of

equity may deem proper to consider in deciding the question: See 1 Jarman on Wills, 5th ed., *879, and Bigelow's notes; and *Field v. Hitchcock*, 17 Pick. 182; 28 Am. Dec. 288.

The counsel for the widow relies upon the case of *Starr v. McEwan*, 69 Me. 334, in which the order was, that the executor should pass personal property to the widow, the court remarking that its possession would be a matter between her and the remainderman. That was all very true in that case, where the property was evidently small in value, and was not money. Here the parties are all leaning upon the court for its advice, and the estate, outside of the realty, is money, amounting to eight hundred dollars. We think, in this case, the widow should give a bond, or a trustee should be appointed.

Or what would possibly be a better disposition of so small a fund, the parties being all *sui juris*, they may, if they can agree, divide the funds, according to their respective interests therein. But this, and other incidental matters, may be best arranged by a single judge after hearing the parties.

Decree accordingly.

PAROL EVIDENCE IS ADMISSIBLE IN SOME OF THE STATES to show that children were intentionally omitted from will: *Lorieux v. Keller*, 5 Iowa, 196; 68 Am. Dec. 696; *Wilson v. Fosket*, 6 Met. 400; 39 Am. Dec. 736, and note; *contra*, *Garraud's Estate*, 35 Cal. 336; *Chace v. Chace*, 6 R. I. 407; 78 Am. Dec. 446; *Bradley v. Bradley*, 24 Mo. 311; *Pounds v. Dab*, 48 Cal. 270.

LIFE ESTATE IN PERSONALTY GIVES DONOR RIGHT TO CONSUME IT, where it cannot be used without so doing, and to wear it out where it cannot be used without such wear: *German v. German*, 27 Pa. St. 116; 67 Am. Dec. 451.

MOORE v. ALDEN.

[80 MAINE, 301.]

WILL. — WHERE A TESTAMENTARY GIFT IS MADE BY HUSBAND TO WIFE IN SATISFACTION OF HER WAIVER OF DOWER in his estate, the gift has a preference over all other unpreferred legacies; but the general rule does not prevail, if the will clearly disclose that the testator intended that such gift should not have a preference over other bequests.

Id. — WHERE SUCH GIFT WAS AN ANNUITY for life to the widow, unconditional and absolute, but the testator had over-estimated the sources of supply upon which its payment depended, the full annuity must be paid her as long as the estate lasts; the source indicated failing, others must supply the deficiency.

UPON BILL IN EQUITY FOR CONSTRUCTION OF WILL, ALLOWANCES FOR THE EXPENSE OF PROFESSIONAL SERVICES AND DISBURSEMENTS may, to a moderate amount, be thrown upon the estate, unless the case be frivolous and unnecessary.

BILL in equity for construction of will.

Joseph E. Moore, plaintiff, *pro se*.

A. P. Gould, for Georgia S. Alden, widow.

T. R. Simonton, for the other defendants.

PETERS, C. J. Horatio E. Alden, whose will is presented to be construed by the court, after directing that certain necessary bills be paid, and giving his wife certain property outright, also gives to her an annuity of one thousand dollars for her lifetime, the annuity to be paid from the earnings of his individual and partnership properties; and he declares that these gifts to his wife are to be in lieu of all allowances, dower, and distributive share to which she might be entitled out of his estate.

He then grants other annuities, their payment made subject to a prior payment of his wife's annuity, and makes sundry bequests, to take effect on the death of his wife. It appears that he died seised of dowable real estate; that no child was left by him; that the widow is now thirty-nine years old; and that the entire estate, reduced to money, now in the hands of the trustee, the administration accounts having been finally settled, amounts to \$11,707.61.

It is evident enough that the annuity to the widow, to say nothing of the other annuities, cannot be obtained from the income and earnings of the estate. And the question of the case is, whether she is entitled to receive the amount each year, although it will be necessary to intrench upon the *corpus* of the estate to supply the deficiency. She correctly claims that the full annuity should be paid to her, as long as the estate lasts, upon the rule, which appears to be well established in the law, that where a testamentary gift is made by husband to wife, in satisfaction of her waiver of dower in his estate, the gift has a preference over all other unpreferred legacies, and for the reason that the estate receives a valuable consideration for such gift. The principle is based upon the idea of contract between husband and wife. He dictates the terms, and she accepts them. The estate gets her right of dower, and she receives the gift in the will in lieu of dower.

This is an old doctrine originating with Lord Cowper, in *Burridge v. Brady*, 1 P. Wms. 127, adopted by Lord Hardwicke, in *Blower v. Morret*, 2 Ves. Sr. 422, which has so extensively prevailed as never to have been dissented from, that we

discover, either in the English or American cases. Its application was resisted by counsel in an early case (*Davenport v. Fletcher*, Amb. 244), where the gift to the wife greatly exceeded in amount the value of the dower, the argument being placed on the great inadequacy of consideration; but the point was overruled, the answer to it being that the testator is the only and best judge of the price at which he is desirous to become the purchaser of the wife's right: Roper on Legacies, 432. The rule does not, however, apply, if the wife has no right of dower. Her right must be subsisting at the death of the testator. Otherwise, she is not a purchaser. In such case she pays no consideration: Same citation.

And the general rule does not prevail, if the will clearly disclose that the testator intended that the gift to his wife should not have a preference over other bequests. The burden will be on the executor to show from the terms of the will that a preference is forbidden. The presumption favors the widow's claim. The intention of the testator, as found in the will, is a part of the contract made with the widow, and if she accepts the provisions of the will, she does so voluntarily, and abides the consequences.

The internal evidence of the will, in the present instance, does not repel but favors the widow's contention. It discloses that the testator, having no child, had great affection for his wife, providing in different ways in his bequests for her protection. The evidence is conclusive that he believed his estate would easily bear all the burdens placed by him upon it. He must have assumed that the annuity to his wife would be needed by her, to sustain the equipments of housekeeping given her, including the support of horses and carriages provided for her use. He makes the payment of his wife's annuity a prior claim to all other bequests. The very relation of husband and wife creates a strong presumption in her behalf, when we consider that after the bounties to her are paid, distant relatives if not strangers are provided for. We think that the will, as a whole, though not by express terms, by implication indicates preference in the devises and bequests to the wife, and struggles to utter it.

There is a clause in the will, which, if standing alone, might seem to look in a contrary direction, and that is the declaration of the testator that the annuity is to be paid from the earnings of his individual and partnership property. We think the idea of the testator in this clause was, that he was

enlarging rather than limiting the funds out of which the annuity might be paid. He devotes for the purpose the earnings of all his properties. He expresses no limitation or condition. The gift is unconditional and absolute, although, as is often the case, he over-estimates the sources of supply which were to assure its payment. The sources indicated turning out to be insufficient, others must be taken to supply the deficiency. It is a demonstrative legacy, not lost because of the non-existence of the property specially pointed out as a means of satisfying it. A case very like this strongly sustains this conclusion: *Smith v. Fellows*, 131 Mass. 20. The following additional references may be profitably consulted upon the general questions of the case: *Heath v. Dendy*, 1 Russ. 543; *Wells v. Borwick*, L. R. 17 Ch. Div. 798; *Potter v. Brown*, 11 R. I. 232; *McLean v. Robertson*, 126 Mass. 537; *Pomeroy's Eq. Jur.*, sec. 1142, note and cases; *Schouler's Executors and Administrators*, sec. 490, and cases in note.

Parties to the bill ask for allowances for the expense of professional services and disbursements. Such expenses may be thrown upon the estate, unless the petitioner discloses a frivolous or unnecessary case: *Howland v. Green*, 108 Mass. 283; *Straw v. Societies*, 67 Me. 493. But such charges should usually be moderate, for several reasons. Because there should not be strong temptation to multiply applications to the court for the exposition of wills; because representatives of estates have not the same stimulus for their protection as living owners have; and because, as a rule, such cases involve a peculiar kind of litigation which casts less responsibility than usual upon counsel, and more upon the court.

The amount of expenses to be allowed in this case, to be settled by the judge who passes upon the form of a decree.

Bill sustained.

COSTS OF BOTH PARTIES MAY BE CHARGED ON ESTATE in case of contest of will, where the contest was in good faith and on probable cause: See *Clapp v. Fullerton*, 34 N. Y. 190; 90 Am. Dec. 681.

EDWARDS v. PETERSON.

[80 MAINE, 267.]

EQUITY WILL UPHOLD AN ASSIGNMENT OF WAGES expected to be earned in the future, but not under an existing employment or contract.

George C. Hopkins and Elliot King, for the plaintiffs.

W. H. Looney, for the defendants.

HASKELL, J. Bill in equity to uphold an assignment of wages expected to be earned in the future, but not under an existing employment or contract.

When the assignment was made, the assignor was in the employ of the respondent steamboat company, but was discharged the next day. The assignment covered wages to be earned in the employ of the steamboat company between the day of its date, October 14th and April 1st, following, and was recorded as required by the Revised Statutes, chapter 111, section 6.

Both the assignor and the steamboat company expected the former's services would be again required by the latter, and that his employment would then begin. It did begin November 1st, and continued latter than April 1st. The assignor was decreed an insolvent debtor January 21st, and on that day the assignee demanded from the steamboat company the wages to be earned thereafter during the time covered by the assignment. The wages were earned, and amounted to more than the debt secured by the assignment. The transactions throughout were open and above-board, and not tainted with fraud.

It is settled at law in this state that "the mere expectation of earning money cannot, in the absence of any contract on which to found such expectation, be assigned. Future wages to be earned under a present contract imparting to them a potential existence may be assigned, although the contract may be indefinite as to time and amount": *Wade v. Bessey*, 76 Me. 413; *Farrar v. Smith*, 64 Id. 74; *Emerson v. E. & N. A. Ry Co.*, 67 Id. 392; 24 Am. Rep. 39. These cases were all actions at law, and, as said in the last case cited, were decided upon "legal, and not equitable, rules."

"It is common learning in the law that a man cannot grant or charge that which he hath not": *Looker v. Peckwell*, 38 N. J. L. 253. But as said by the chief justice in *Emerson v. Railway Co.*, *supra*, "the reason that it may be different in

equity is, not that a man conveys in *presenti* what does not exist, but that which is in form a conveyance operates in equity by way of present contract merely, to take effect and attach to the things assigned as soon as they come in *esse*, to be regarded before that time as only an agreement to convey, and after that time as a conveyance."

So it was held in *Field v. Mayor etc. of New York*, 6 N. Y. 179, 57 Am. Dec. 435, that the assignment of a claim against the city for work to be done and materials to be furnished, not founded upon an existing contract and having no potential existence, was valid in equity. The court says (page 187): "The better opinion, I think, now is, that courts of equity will support assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them."

So in *Williamson v. Colcord*, 1 Hask. 620, it was held that the mere expectancy and possibility of indemnity for the destruction of a vessel by a rebel cruiser was subject to donation, even before the Geneva commission was agreed to by England and the United States.

An assignment of a legacy expected from a living person was held valid in equity after the legacy became payable. The court says: "Even a naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale, if made *bona fide*, for a valuable consideration, and will be enforced in equity after the death of the ancestor": *Bacon v. Bonham*, 33 N. J. Eq. 616; 27 Id. 209.

The true doctrine seems to be, "that, to make a grant or assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment. But courts of equity support assignments, not only of choses in action, but of contingent interests and expectations, and also of things which have no present actual or potential existence, but rest in mere possibility only": *Smithurst v. Edmunds*, 14 N. J. Eq. 416; *Langton v. Horton*, 1 Hare, 549; *Robinson v. McDonnell*, 5 Maule & S. 228; *Whitworth v. Ganyim*, 3 Hare, 416; *Apperson v. Moore*, 30 Ark. 56; 21 Am. Rep. 170.

Nor can injustice result from this doctrine. If the *res* come to the hands of the assignor subject to liens or encumbrances, the assignee must take it subject thereto: *Williamson v. New*

Jersey S. R. R. Co., 29 N. J. Eq. 311; *Wellenk v. Morris Canal Co.*, 18 Id. 377; *Dunham v. Railway Co.*, 1 Wall. 254; *Galveston R. R. Co. v. Cowdrey*, 11 Id. 459; *United States v. N. O. R. R. Co.*, 12 Id. 362.

The invalidity of a grant at law of a mere expectancy imports no more than that it is ineffectual to pass the legal title. Equity construes the instrument as imposing a lien upon the *res* when produced or acquired, leaving the legal title still in the grantor, who may by some act ratify the grant, as by delivery of the property, and then the legal title is complete in the vendee: *Everman v. Robb*, 52 Miss. 653; 24 Am. Rep. 682.

So in *Deering v. Cobb*, 74 Me. 332, a mortgage of a stock of goods covering new goods purchased with the proceeds of the stock sold was held valid at law, after possession taken by the mortgagee, as against the assignee in insolvency of the mortgagor.

The rule laid down by Judge Story in *Mitchell v. Winslow*, 2 Story, 630, seems to have been very generally followed by all chancery courts in this country. He says: "It seems to me a clear result of all the authorities that, whenever the parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy." This rule has been followed in *Pennoch v. Coe*, 23 How. 117; *Seymour v. C. & N. F. R. R. Co.*, 25 Barb. 288; *Sellers v. Leister*, 48 Miss. 524; *Butt v. Ellett*, 19 Wall. 544; *Apperson v. Moore*, 30 Ark. 56; 21 Am. Rep. 170; *McCaffrey v. Woodin*, 65 N. Y. 459; 22 Am. Rep. 644; *Barnard v. N. & W. R. R. Co.*, 4 Cliff. 351; *Brett v. Carter*, 2 Low. 458; *Gregg v. Sanford*, 24 Ill. 719; 76 Am. Dec. 719, with an elaborate note citing many authorities 723; *Walker v. Vaughn*, 33 Conn. 577; *Wilcox v. Daniels*, 15 R. I. 261.

The case of *Halroyd v. Marshall*, 10 H. L. Cas. 223, seems to extend the rule stated further than Judge Story. In that case it is said: "Whatever doubts, therefore, may have been formerly entertained upon the subject, the right of priority of an equitable mortgagee over a judgment creditor, though without notice, may now be considered to be firmly established."

Our own court has laid down the rule: "At law, property non-existing, but to be acquired at a future time, is not assignable. In equity it is so": *Hamlin v. Jerrard*, 72 Me. 77; *Morrill v. Noyes*, 56 Id. 458; 96 Am. Dec. 486; *Griffith v. Douglass*, 73 Id. 532.

The assignment set up in this case was given to secure the payment for groceries furnished and to be furnished to the assignor and his family. It is of wages to be earned of a certain employer within a specified time. It was seasonably recorded. No claim is made under it until actual notice had been given to the employer. No other creditor intervenes an attachment or otherwise objects to the validity of the assignment. The controversy is practically between the immediate parties to it. It cannot be said to contravene public policy: *Smith v. Atkins*, 18 Vt. 461. The consideration was most meritorious, and the assignment was not given to delay creditors.

Whether such an assignment would be valid against subsequent attaching creditors, with or without notice, it is not here necessary to decide; nor is the effect of the record of such an assignment as notice to the employer or to attaching creditors considered; nor is an assignment upheld where it appears to have been given without a meritorious consideration, or to have operated to hinder or delay creditors, indicating a want of equity.

From the authorities cited, the court is clearly of opinion that the assignment must be upheld, and therefore, agreeable to the stipulation of the parties, ordered.

Exceptions sustained. Demurrer overruled. Judgment against both respondents for the sum of fifty-four dollars, and interest from April 1, 1886, with costs. Decree below accordingly.

ASSIGNMENT OF FUTURE EARNINGS: See note to *Skipper v. Stokes*, 94 Am. Dec. 649, 650; *Freesman on Executions*, sec. 170.

FOWLER v. WESTERN UNION TELEGRAPH COMPANY.

[80 MAINE, 381.]

TELEGRAMS — CONDITION THAT SENDER WILL NOT CLAIM DAMAGES for errors, delays, or omissions, "happening from any cause," is unreasonable and void. Whether such conditions are reasonable or not must be determined with reference to public policy rather than private contract.

TELEGRAPH COMPANIES ARE NOT COMMON CARRIERS in the strict sense of the term, although engaged in a public employment, and are bound to transmit for all persons messages presented to them for that purpose.

TELEGRAPH COMPANIES DO NOT INSURE ABSOLUTELY THE SAFE AND ACCURATE TRANSMISSION OF MESSAGES as against all contingencies, where there is an absence of a contract or regulation modifying their liability.

TELEGRAPH COMPANIES IN TRANSMITTING MESSAGES ARE BOUND TO EXERCISE ORDINARY CARE, and should be responsible for any negligence or unfaithfulness in the performance of their duties; they are bound to have suitable instruments and competent servants, and to see that the service is rendered with that degree of care and skill which the peculiar nature of the undertaking requires.

LIABILITY IS NOT IMPOSED ON TELEGRAPH COMPANY IN TRANSMITTING MESSAGES for want of skill or knowledge not reasonably attainable in the art, nor for errors or imperfections which arise from causes not within its control, or which are not capable of being guarded against.

EVIDENCE — BURDEN OF PROOF. — **PRIMA FACIE CASE IS MADE OUT AGAINST TELEGRAPH COMPANY** when it is shown that the message which the company undertook to send was not delivered, and that damage has resulted, and the burden of proof is then thrown upon the company to show the exercise of ordinary care, and that its failure to transmit and deliver the message was not caused by its fault or negligence, or that of its employees.

Woodman and Thompson, for the plaintiffs.

Baker, Baker, and Cornish, for the defendant.

FOSTER, J. This case comes up on report. It appears that on the evening of August 20, 1883, the plaintiffs, whose business is that of pork packing, delivered to the defendants' agent at Portland, for transmission and delivery, the following night-message: —

"PORTLAND, Aug. 20, 1883.

"To H. F. GOOGINS, Union Stock Yards, Ill.

"Ship one car hogs to-morrow.

"THOMPSON, FOWLER, & Co."

The message never having been delivered by the defendants, this action is brought to recover damages alleged to have been sustained in consequence.

In defense of the action, the defendant introduced evidence and established the following facts: —

At the Union Stock Yards, which are about six miles from Chicago, the defendant company had only a day-office, open from half-past six in the morning till ten o'clock in the evening. Night-messages directed to the stock yards, received at the Chicago office during the night, were necessarily kept in that office until after the opening of the office at the stock yards on the following morning. This dispatch was received at the Chicago office during the night of August 20-21, and the copy was hung upon what was called the stock yards' hook in the operating-room, awaiting the opening of the office at that place on the morning of the 21st. About thirty minutes past six that morning, and immediately prior to the opening of the stock yards' office, a fire suddenly broke out in the operating-room of the Chicago office, and spread with such rapidity that nothing could be saved from the room; and this copy, together with everything in the room, was destroyed.

The fire was first discovered in this room upon the back of the "switch-board," where it is covered with numerous wires necessarily running very close to each other, and was caused by the crossing of several wires charged with large batteries. This crossing resulted from atmospheric conditions, the moisture accumulating on the back of the switch-board, forming a partial connection between the wires, and acting as a partial conductor, thereby causing the electric current to leave its proper course, with the result as above stated.

That such accidents are exceedingly rare is not disputed, and that there are no improvements known to the art, or anywhere in use, by which the possibility of such an occurrence can be prevented.

In consequence of this fire, it became impossible for the defendant to deliver the plaintiffs' message.

This message, delivered to the company, was written upon a night-message blank, and after stipulating that the company would receive messages to be sent without repetition during the night, for delivery not earlier than the morning of the next ensuing business day, at reduced rates, there followed this condition: "That the sender will agree that he will not claim damages for errors or delays, or for non-delivery of such messages, happening from any cause, beyond a sum equal to ten times the amount paid for transmission," etc.

Above the written message were these words: "Send the following night-message, subject to the above conditions, which are hereby agreed to."

No evidence was offered at the trial or question raised in reference to the stipulations and condition further than what appears upon the message blank signed at the bottom of the message. Nor is any question raised by counsel in argument before this court in relation to the validity of such a condition as is found attached to this stipulation or agreement. By its very terms, if held valid, this condition would relieve the company from all liability whatsoever for errors, delays, or omissions "happening from any cause." It would protect them from all liability happening as the result of their own negligence. Whatever force or effect other courts may give to such conditions, whether as a regulation of the company or as a contract between the parties, it is now too well settled by this court to admit of question or contradiction that they are unreasonable and void: *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437; *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Ayer v. Western Union Tel. Co.*, 79 Me. 493. As in the case of common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence. Whether such conditions are reasonable or unreasonable must be determined with reference to public policy rather than private contract: *Express Co. v. Caldwell*, 21 Wall. 270.

The defense, however, is based entirely upon other grounds. No conditions contained in the stipulation are relied upon as a defense in this action. But it is claimed that under the facts in the case, concerning which there is no controversy, the defendant company cannot be deemed guilty of any negligence, and therefore cannot be held to respond in damages. To ascertain the duties and liabilities of the defendant company, we must look to the nature of the employment, and, except so far as it has limited its ordinary obligations by any special stipulation which may be held to be reasonable, be governed by the general and well-established principles of law pertaining to such employment.

It is now perfectly well settled, by the great weight of judicial authority, that although telegraph companies are engaged in what may appropriately be termed a public employment, and are therefore bound to transmit, for all persons, messages presented to them for that purpose, they are not common carriers in the strict sense of the term. To be sure, they are engaged in a business almost, if not quite, as important to the public as that of carriers. But while the analogy between the

common carrier of goods and the common carrier of messages is very strong, nevertheless their responsibility differs in a manner corresponding to the difference in the nature of the services they perform. The common carrier of goods, in the absence of any special contract or regulation limiting its general liability, becomes an insurer of property intrusted to it for carriage. Whereas, in the absence of any contract or regulation modifying the liability of telegraph companies, they do not insure absolutely the safe and accurate transmission of messages as against all contingencies, but they are bound to transmit them with care and diligence adequate to the business which they undertake, and for any failure in such care and diligence they become responsible. This appears to be the doctrine now settled by the courts, and is founded upon reason. The following decisions in this country are authority, and may properly be cited in this connection: *Bartlett v. Western Union Tel. Co.*, 62 Me. 220, 221; 16 Am. Rep. 437; *Ayer v. Western Union Tel. Co.*, 79 Me. 493; *Ellis v. American Tel. Co.*, 13 Allen, 232, which holds them to the use of due and reasonable care, and liable for the consequences of their negligence in the conduct of their business to those sustaining loss or damage thereby; *Breese v. United States Tel. Co.*, 48 N. Y. 141; 8 Am. Rep. 526; *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 571; 1 Am. Rep. 446; *Baldwin v. United States Tel. Co.*, 45 N. Y. 751; 6 Am. Rep. 165; *Birney v. New York etc. Tel. Co.*, 1 Daly, 547; *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Western Union Tel. Co. v. Graham*, 1 Col. 230; *Sweetland v. Illinois etc. Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Western Union Tel. Co. v. Neill*, 57 Tex. 283; 44 Am. Rep. 589; *Washington etc. Tel. Co. v. Hobson*, 15 Gratt. 122; *Pinckney v. Telegraph Co.*, 19 S. C. 71; *Smithson v. United States Tel. Co.*, 29 Md. 167; *Little Rock etc. Tel. Co. v. Davis*, 41 Ark. 79.

A more stringent rule, however, was at first suggested in two early cases. The earliest one in which the question of the liability of telegraph companies arose was that of *MacAndrew v. Electric Tel. Co.*, 17 Com. B., 84 Eng. Com. L. 3, decided in England in 1855. This case, by implication, only can be said to be authority for holding them to the liability of insurers. It was soon followed in this country by the case of *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589, decided in 1859, the only case to be found in which telegraph companies have been expressly held to be common

carriers, and subject to the same severe rule of responsibility. With this exception, all the American courts which have expressed any decided opinion upon this question have concurred in the doctrine above stated.

The degree of care which these companies are bound to use is to be measured with reference to the kind of business in which they are engaged. As compared with many other kinds of business, the care required of them might be called "great care." While meaning really the same, it is variously stated by different courts in the decisions to which we have referred,—“due and reasonable care,” “ordinary care and vigilance,” “reasonable and proper care,” “reasonable degree of care and diligence,” “care and diligence adequate to the business which they undertake,” “with skill, with care, and with attention,” “a high degree of responsibility.” These are but the varied forms of expressing the requirement of what is known in law as ordinary care, as applied to an employment of this nature, an employment which is not that of an ordinary bailee. The public, as a general rule, have no choice in the selection of the company. They have none in the selection of its servants or agents. They have no control over the agencies or instrumentalities used in conducting the business of the company. The public must take the agencies which the companies furnish, and they have no supervision over its management or methods of performing the service which it holds itself out as willing and ready to perform. And while we do not hold that these companies are common carriers, and subject to the same severe rule of responsibility, we think that those who engage in the business of thus serving the public by transmitting messages should be held to a high degree of diligence, skill, and care, and should be responsible for any negligence or unfaithfulness in the performance of their duties.

A telegraph company which holds itself out to the public as ready to transmit all messages delivered to it is bound to have suitable instruments and competent servants, and to see that the service is rendered with that degree of care and skill which the peculiar nature of the undertaking requires. We do not understand, however, that this duty would impose a liability upon the company for want of skill or knowledge not reasonably attainable in the art, nor for errors or imperfections which arise from causes not within its control, or which are not capable of being guarded against: *White v. Western Union*

Tel. Co., 14 Fed. Rep. 710; *Sweetland v. Illinois etc. Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285; *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 572; 1 Am. Rep. 446; *Ellis v. American Tel. Co.*, 13 Allen, 233; *Bartlett v. Western Union Tel. Co.*, 62 Me. 221; 16 Am. Rep. 437.

We think our own court has expressed the doctrine we are discussing in language so fitting that we may be justified in making the following extended quotation from the case last cited:—

“To require a degree of care and skill commensurate with the importance of the trust reposed, is in accordance with the principles of law applicable to all undertakings of whatever kind, whether professional, mechanical, or that of the common laborer. There is no reason why the business of sending messages by telegraph should be made an exception to the general rule. This requires skill as well as care. If the work is difficult, greater skill is required. It is often necessary to intrust to this mode of communication matters of great moment, and therefore the law requires great care. It is necessary to use instruments of a somewhat delicate nature and accurate adjustment, and therefore they must be so made as to be reasonably sufficient for the purpose. The company, holding itself out to the public as ready and willing to transmit messages by this means, pledges to that public the use of instruments proper for the purpose, and that degree of skill and care adequate to accomplish the object proposed. In case of failure in any of these respects, the company would undoubtedly be liable for the damage resulting. This would not impose any liability for want of skill or knowledge not reasonably attainable in the present state of the art, nor for errors resulting from the peculiar and unknown condition of the atmosphere, or any agency from whatever source, which the degree of skill and care spoken of is insufficient to guard against or avoid.”

Taking the facts as proved in the case now under consideration, and applying the principles of law to them, are the plaintiffs entitled to recover?

They make out a *prima facie* case when they show that the message which the company undertook to send was not delivered, and that damage has resulted. It is not necessary that they show affirmatively that the failure to deliver happened through any omission of duty by the company or its officers, or from some defect in the instrumentalities employed by the

company. The failure to deliver being shown, the legal presumption is, that it was caused by some one or the other of these causes, or of all combined. It then becomes incumbent on the defendant, if it would relieve itself from the consequences of such presumption, to overcome that presumption by showing that in the attempted transmission and delivery of the message it exercised all proper care and diligence commensurate with the undertaking, and that the failure is not attributable to any fault or negligence on its part, or that of any of its employees: *Bartlett v. Western Union Tel. Co.*, 62 Me. 221; 16 Am. Rep. 437; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *Western Union Tel. Co. v. Graham*, 1 Col. 230; *Shearman and Redfield on Negligence*, sec. 559; *Western Union Tel. Co. v. Wenger*, 55 Pa. St. 262.

The case last named was, where a message, sent by the plaintiff's line to New York, was transmitted only to Philadelphia, and no reason was assigned for the failure to transmit the message to its destination. The court say: "No such reason as the law would recognize, and indeed no reason at all, was given for the failure to transmit the message to its destination. Thus was presented a clear case of gross negligence against the company, in performing its undertaking, and a consequent liability to the plaintiff for such damage as he had sustained in consequence thereof."

The case at bar is unlike that. While it is true that the message in this case was not transmitted to its destination, the defendant here has assumed the burden of proof, after the *prima facie* case of the plaintiffs, and by evidence which is uncontradicted has shown that the failure was caused by agencies over which it had no control, and for which it was not responsible. The dispatch when received at the Chicago office during the night was taken from the wire, and the relay copy was hung upon the stock yards' hook, to be forwarded the following morning when the office at that place should open. This is all that could be done that night. By the terms of the company's stipulation or regulation to which the plaintiffs by their signature thereto, either assented, or by which they must be held to be estopped,—*Breese v. United States Tel. Co.*, 48 N. Y. 141, 142; 8 Am. Rep. 526; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 307; 18 Am. Rep. 485,—aside from the void condition of which we have spoken, the message was not to be delivered earlier than the morning of the next ensuing business day. An earlier transmission in this

case was impossible. Immediately prior to the time for forwarding the message over the line communicating with the stock yards, a fire suddenly broke out in the operating-room, and before anything could be rescued, the whole room was enveloped in flames, and this message destroyed.

The origin of the fire, as we have stated, and as the evidence shows, was due to atmospheric conditions and influences, over which the defendant company had no control. There were no improvements known or anywhere in use which could guard against the possibility of such an occurrence. If the company ought to have foreseen that such an accident might happen, or if such an occurrence could reasonably have been anticipated, and it could have been guarded against, then the omission to provide against it might be held to be actionable negligence. But the facts as they appear in the case rebut any negligence on this ground. That it was likely to occur was only a possibility. The fire does not appear to have originated through any fault or negligence of the company or its employees, or through any imperfection in the chemicals, metals, machinery, or implements used by it, which, by any skill or knowledge reasonably attainable in the present state of telegraphy, could be guarded against.

The facts proved bring the case within the decisions to which we have referred in another part of this opinion, and upon those facts and the law, it is the opinion of the court that the plaintiffs cannot prevail.

Judgment for defendant.

TELEGRAPH COMPANY CANNOT LIMIT ITS LIABILITY so as to relieve itself against gross negligence: See *Western Union Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795, and note.

MERE PRODUCTION OF TELEGRAM CONTAINING MISTAKES is sufficient to make out *prima facie* case of negligence against the telegraph company: *Western Union Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795, and note.

TELEGRAPH COMPANIES HAVE BEEN HELD TO BE COMMON CARRIERS: *Parks v. Alta Tel. Co.*, 13 Cal. 422; 73 Am. Dec. 589; but see, *contra*, the note to *Camp v. Western Union Tel. Co.*, 71 Id. 463; *Birney v. Print. & Tel. Co.*, 18 Md. 341; 81 Am. Dec. 610.

BRADBURY v. FIRE INSURANCE ASSOCIATION OF ENGLAND. SAME v. NORWICH UNION FIRE INS. SOC. SAME v. WESTERN ASSURANCE CO. SAME v. WESCHESTER FIRE INS. CO. SAME v. NORTH BRITISH AND MERCANTILE INS. CO.

[80 MAINE, 308.]

FIRE INSURANCE. — A POLICY UPON PERSONAL PROPERTY IN A CERTAIN PLACE, the separate articles of which are not specifically described, does not attach to and follow portions of such property when removed to another place for repairs without the company's knowledge or consent, and destroyed while there.

George C. and Charles E. Wing, for the plaintiff.

Nathan and Henry B. Cleaves, for the defendant.

LIBBEY, J. These actions are on fire policies, and being substantially alike, were tried together, and come to this court in one report. The first four policies insure a certain sum on the plaintiff's "frame stable building, occupied by assured as a hack, livery, and boarding stable, situated on the north side of Court Street, Auburn, Maine," and "five hundred dollars on his carriages, sleighs, hacks, hearses, harnesses, blankets, robes, and whips contained therein." The fifth does not insure the building, but insures fifteen hundred dollars on the same kinds of personal property, "stored in the private frame stable occupied by assured, and situated near east side of Main Street, Auburn, Maine."

The loss claimed by the plaintiff is for damage by fire to a hack not in his stable named in the policies at the time of the damage, but in a repair-shop of one Litchfield, on another street about one eighth of a mile distant, where it had been removed the day before the fire without the knowledge or consent of the defendant, and it is admitted that the board rate for insurance on Litchfield's repair-shop and contents was one per cent more than on the plaintiff's stable on Court Street.

The damage to the hack by fire while at Litchfield's shop is admitted, and no question is made as to the sufficiency of the notices. The only contention between the parties is, whether the insurance attached to and followed the plaintiff's carriages, hacks, etc., when removed from his stable to another place for repairs or some other temporary purpose, or was limited to such carriages only as were at or in the stable named at time of loss or damage.

Upon this question there appears some conflict among the authorities. The general rule stated by text-writers and held by the general current of decided cases is, that place where the personal property insured is kept is of the essence of the contract, as by that the character of the risk is largely determined, and the property is covered by the policy only while in the place described: Wood on Insurance, 110; Blodgett on Fire Insurance, 22; *Eddy Street Iron Foundry v. Hampden S. & M. F. Ins. Co.*, 1 Cliff. 300; *Annapolis etc. R. R. Co. v. Baltimore Ins. Co.*, 43 Md. 506; *Fitchburg R. R. Co. v. Charleston M. F. Ins. Co.*, 7 Gray, 64.

The following cases are cited as establishing an exception to the general rule, and as sustaining the plaintiff's contention: *Everett v. Continental Ins. Co.*, 21 Minn. 76; *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Id. 229; *McClure v. Girard Ins. Co.*, 43 Iowa, 349; 22 Am. Rep. 249; *Longueville v. Western Ins. Co.*, 51 Iowa, 553; 33 Am. Rep. 146; *Lyons v. Providence Washington Ins. Co.*, 13 R. I. 347; 43 Am. Rep. 32.

We think a careful examination of all these cases will show that the chattels insured are so described in the policy that they can be identified without reference to the building or place where they were kept, and the courts held that the words "contained in" a certain building, or kept in a certain building or place, was a part only of the description of the chattel, and if from its nature, character, or ordinary use the parties must have understood that it was to be out of the building or place a part of the time, in ordinary use, the policy should be held to cover it while so out. This is going to the verge in construing the language used by the parties in a contract, when ordinarily it does not bear such meaning. But this case does not appear to us to be within the authority of those cases.

The policies in suit do not insure a particular carriage or hack by any description by which it can be identified without reference to the stable. They do not insure all the plaintiff's carriages, hacks, etc., used in his livery business contained in the stable described. It cannot be held that they cover only such carriages, hacks, etc., as were contained in the building named at the date of the policies. From the nature of the plaintiff's business, it must have been in the contemplation of the parties that the chattels named might be changed from time to time during the year, some sold, some worn out, some destroyed by accident, and others put in to take their places.

The policies are similar to an insurance of a shop-keeper on his stock of goods in his shop, or of a railroad company on its rolling stock on its road, constantly changing. In such case the property insured can be ascertained only from the place of business named: *Lyons v. Providence Washington Ins. Co.*, 13 R. I. 347; 43 Am. Rep. 32; *Eddy Street Iron Foundry v. Hampden S. & M. F. Ins. Co.*, 1 Cliff. 300; *Ring v. Phoenix Assurance Co.*, 145 Mass. 426. The policies insure such of the plaintiff's carriages, hacks, etc., as are contained in his stable at the time of loss. We can see no other way of identifying the property covered by the policies. It cannot be that the policies should be so construed that they will cover a hack once put into the stable and then taken out, wherever it may be. The language of the contract is not apt to embrace such a risk. The risk might thus be increased twofold or threefold, and still if the contract must be construed as covering it, it is not a forfeiture of the policy for an increase of the risk. It is simply the risk contemplated by the parties: *Fitchburg R. R. Co. v. Charleston M. F. Ins. Co.*, 7 Gray, 66.

The view we take of the first four policies makes it unnecessary to consider whether the terms of the fifth policy should receive a construction more strongly against the plaintiff. They are certainly no more favorable to him.

The actions are not sustained.

Judgment for the defendants in each action.

WHETHER REMOVAL OF PROPERTY FROM PLACE WHERE IT IS INSURED WILL AVOID POLICY, see the note to *Peterson v. Mississippi V. I. Co.*, 95 Am. Dec. 751-753.

CLARK v. BRADSTREET.

[80 MAINE, 454.]

EVIDENCE. — IT IS ERROR IN BASTARDY PROCESS TO PERMIT INSPECTION BY JURY OF INFANT CHILD six weeks old, to enable them to judge from a comparison of its appearance, complexion, and features with those of the defendant, whether any inference could legitimately be drawn therefrom as to its paternity; to decide otherwise would establish an unwise, dangerous, and uncertain rule of evidence.

J. H. Potter, for the plaintiff.

H. M. Heath, for the defendant.

FOSTER, J. This was a bastardy process, in which a verdict was rendered for the complainant.

At the trial, the child, then but six weeks old, was offered, admitted in evidence, and exhibited to the jury by the complainant, against the defendant's objection, and exceptions were taken.

Notwithstanding the paternity of the child was sought to be established and the putative father was defendant in the suit, we think the exceptions must be sustained.

The only object for which it is claimed that the child was introduced in evidence and viewed by the jury was to enable them to judge from a comparison of its appearance, complexion, and features with those of the defendant, whether any inference could legitimately be drawn therefrom as to its paternity.

In a case like this, where the child was a mere infant, such evidence is too vague, uncertain, and fanciful, and if allowed would establish not only an unwise, but dangerous and uncertain rule of evidence.

While it may be a well-known physiological fact that peculiarities of form, feature, and personal traits are oftentimes transmitted from parent to child, yet it is equally true as a matter of common knowledge that during the first few weeks, or even months, of a child's existence, it has that peculiar immaturity of features which characterize it as an infant, and that it changes often and very much in looks and appearance during that period. Resemblance can then be readily imagined. This is oftentimes the case. Frequently such resemblances are purely notional or imaginary. What may be considered a resemblance by one may not be perceived by another having equal knowledge of the parties between whom the resemblance is supposed to exist. If there should be a likeness of features, there might be a difference in the color of the hair or eyes. As was said by the court in *People v. Carney*, 29 Hun, 47: "Common observation reminds us that in families of children different colors of hair and eyes are common, and that it would be dangerous doctrine to permit a child's paternity to be questioned or proved by the comparison of the color of its hair or eyes with that of the alleged parent." Mr. Justice Heath, in the case of *Day v. Day*, 6 Jur., N. S., 365, at the Huntington assizes in 1797, upon the trial of ejectment, where the question was one of *partus suppositio*, admitted that resemblance is frequently exceedingly fanciful, and therefore cautioned the jury in reference to such evidence. And in a trial in bastardy proceedings, the mere fact that a

resemblance is claimed would be too likely to lead captive the imagination of the jury, and they would fancy they could see points of resemblance between the child and the putative father.

As in the case at bar, where the infant was but a few weeks old, such evidence, if allowed in determining the paternity of the child, would be exceedingly fanciful, visionary, and dangerous.

The testimony of witnesses, where they have no special skill or knowledge in such matters, has never been admitted in this state or Massachusetts to prove a resemblance in the features between the child and the alleged father: *Keniston v. Rowe*, 16 Me. 38; *Eddy v. Gray*, 4 Allen, 438; nor points of dissimilarity, not implying a difference of race: *Young v. Makepeace*, 103 Mass. 54.

We are aware that in New Hampshire, Massachusetts, and North Carolina, and perhaps some of the other states, on an issue of bastardy, the courts have allowed the jury to judge of likeness by inspection: *Gilmanton v. Ham*, 38 N. H. 108; *Finnegan v. Dugan*, 14 Allen, 197; *State v. Arnold*, 13 Ired. 184; *State v. Woodruff*, 67 N. C. 89. And in deciding with regard to the color of the child, whether of negro blood or not, it has been held proper to exhibit it to the jury: *Warlick v. White*, 76 Id. 175; *Garvin v. State*, 52 Miss. 207. No one will doubt the propriety or reason upon which these decisions are based, when the question is one of race or color, for it is well understood that there are marked distinctions, physical and external, between the different races of mankind, which may enable men of ordinary intelligence and observation to judge whether they are of one race or another.

In *State v. Smith*, 54 Iowa, 104, 37 Am. Rep. 192, the child was two years and one month old; and the court there held that a child of proper age might be exhibited to the jury, and that it was not error to exhibit a child of that age, with instructions to the jury to disregard the evidence unless they could see the resemblance claimed.

In the decisions from New Hampshire and Massachusetts, nothing appears to show the age of the child of which the court speak. Our attention has been called to no other decisions in New England, nor have we been able to find any, where this question has come before the courts. But from a careful examination of the cases in those states where the question has arisen, we are satisfied that the weight of author-

ity is against the admission in evidence of a mere infant, where race or color is not involved.

Thus in *Hanawalt v. State*, 64 Wis. 84, 54 Am. Rep. 588, a child less than one year old was exhibited to the jury for their inspection. This was held error, and the court say: "When applied to the immature child, its worthlessness as evidence to establish the fact of parentage is greatly enhanced, and is of too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury."

In *State v. Danforth*, 48 Iowa, 331, 30 Am. Rep. 387, where the child was but three months old, the court say that the resemblance of infants to the father is too uncertain and indistinct to be allowed as evidence, and that it would be an unwise and dangerous rule to permit the admission of a child of that age.

In *Risk v. State*, 19 Ind. 152, the court doubted the right to introduce an infant in evidence, saying that it had seen no authority on the point, that it would be an uncertain rule, and would involve the necessity of giving the alleged father in evidence. The same question was before that court in *Reitz v. State*, 33 Id. 187, where the child was held up before the jury for inspection, but the court decided it was improper, and told the jury to disregard it: See also *People v. Carney*, 29 Hun, 47. Exceptions sustained.

IN BASTARDY PROCEEDINGS, CHILD OF IMMATURE AGE may not be exhibited to the jury to show resemblance: *Hanawalt v. State*, 64 Wis. 84; 54 Am. Rep. 588; but when the child was two years and one month old, the court held this might be done: *State v. Smith*, 54 Iowa, 104; 37 Am. Rep. 192.

EVIDENCE OF RESEMBLANCE OF CHILD TO DEFENDANT: See note to *Weatherford v. Weatherford*, 56 Am. Dec. 218; *State v. Danforth*, 49 Iowa, 43; 30 Am. Rep. 387; *Risk v. State*, 19 Ind. 152; *Keniston v. Rowe*, 16 Ma. 33.

DANFORTH v. ROBINSON.

[80 MAINE, 466.]

PLEA IN BAR—DISCHARGE IN INSOLVENCY.—One surety on a note, given before the insolvent law went into effect, and who has paid it and recovered judgment for contribution against his co-surety after the insolvent law took effect, can maintain an action on the judgment, notwithstanding the judgment debtor was subsequently discharged.

J. J. Parlin, for the plaintiff.

Walton and Walton, for the defendant.

VIRGIN, J. These parties were co-sureties on a promissory note given in September, 1875. In 1879, the plaintiff paid the note to the holder, and in March, 1885, recovered judgment against the defendant for contribution. Subsequently, the defendant duly obtained his discharge in insolvency from all his debts, etc., which existed in May, 1885.

The insolvent law went into full effect on September 1, 1878, when the federal bankrupt law was repealed.

The present action is debt on the judgment of March, 1885, to which the defendant has pleaded his discharge in bar.

The principal question is, whether one surety on a note, given before the insolvent law went into effect, who paid it and recovered judgment for contribution against his co-surety after the insolvent law took effect, can maintain an action on the judgment *non obstante* the judgment debtor's discharge.

It seems to be settled law that, as between co-sureties, the right of action for contribution in behalf of one of them who has paid the whole debt for which they were liable arises when he pays, and not before. And then, and not before, can he prove his claim for contribution against the estate of his insolvent co-surety: *Dole v. Warren*, 32 Me. 94; 52 Am. Dec. 640. But while the right of action did not arise until he paid, it does not necessarily follow that the original liability, which then had ripened into a right of action, had not existed before.

It is contended that, as the defendant's discharge, by force of the statute, "released him from all debts, claims, liabilities, and demands which were or might have been proved against his estate in insolvency," and which existed in May, 1885 (R. S., c. 70, sec. 49); and as the plaintiff not only paid the whole note, but also recovered judgment against the defendant for his contributory share, prior to May, 1885,—the plaintiff's claim became an existing one, which "might have been proved against the estate in insolvency" of the defendant, and hence was one of the claims covered by the discharge. But this language of the statute must not be taken literally, for thus construed, it would include claims and debts which antedated the insolvent law, and thus render that provision unconstitutional, as impairing "the obligation of contracts,"—U. S. Const., art. 1, sec. 10; Me. Const., art. 1, sec. 11; *Palmer v. Hixon*, 74 Me. 447, 449,—as well as debts owed by citizens of this state to those of another state, regardless of date: *Hills*

v. *Carlton*, 74 Id. 156. Hence the "debts, claims, liabilities, and demands," from which the defendant was released by his discharge, must be limited to such as originated after the law, by its terms, took effect, together with such as were between citizens of this state, unless the creditors or claimants in such excepted cases elected to prove their claims: *Fogler v. Clark*, 80 Me. 237; *Palmer v. Hixon*, *supra*; *Hills v. Colton*, *supra*.

Did the liability of the defendant originate prior to the insolvent law? We think this question has been decided in the affirmative in this state, and it is therefore *res judicata*.

The note which these parties signed as sureties was given three years before the insolvent law was enacted, and hence the law could not have formed a part of the note "as the measure of the obligation to perform it": *McCracken v. Hayward*, 2 How. 612; or of the right of contribution between the co-sureties, provided that right was founded on an implied contract or promise raised by the law from the mutual relation of the parties at the time, and in consequence of their execution of the note, unless it became merged in the judgment of March, 1885.

This court, at an early day, decided that "at the time of executing an instrument by several persons as sureties, each one impliedly promises all the others that he will faithfully perform his part of the contract, and pay his proportion of the loss arising from the total or partial insolvency of the principal. . . . Such a promise resembles that by which a man binds himself to pay a certain sum of money at a future day." And following out this principle, the court held that the relation of debtor and creditor among the sureties on a bond, so as to entitle one of them to impeach a voluntary conveyance made by another, commences at the time of executing the bond, and not at the time when he actually pays more than his proportion of the debt: *Howe v. Ward*, 4 Me. 196. And the language above quoted was reiterated in *Thompson v. Thompson*, 19 Id. 244; 36 Am. Dec. 751. The same was adhered to in *Thacher v. Jones*, 81 Me. 528, 532, where it was held that an indorser of a note was a creditor of the maker. So in *Pulsifer v. Waterman*, 73 Id. 233, 238, *Howe v. Ward*, *supra*, was reaffirmed, holding that the relation of debtor and creditor existed between a first and second indorser of a promissory note when it was executed by them.

So in Massachusetts, *assumpsit* for contribution was sus-

tained by a surety, who paid after the decease of his co-surety, against the latter's executors upon the implied promise of the testator: *Bachelder v. Fiske*, 17 Mass. 463. In a later case, the heirs of a deceased surety were held to contribute to a co-surety who paid after the decease of the defendant's intestate. In speaking for the whole court, Shaw, C. J., said: "The right of action grows out of the original implied agreement arising out of their being co-sureties, that if one shall be compelled to pay the whole or a disproportionate part of the debt, for which both thus collaterally and provisionally stipulated to be liable, the other will pay such a sum as will make the common burden equal": *Wood v. Leland*, 1 Met. 387, 389. The same eminent jurist had used similar language: *Chaffee v. Jones*, 19 Pick. 260, 264.

The defendant cites several authorities which hold that the liability to contribution arises from the equitable principle that "equality is equity," and not from contract. Doubtless the ancient common law knew nothing of equalizing the burdens of sureties. "Its conception and origin," like numberless other modern rules of law, "are wholly due to the creative functions of the chancellor." Thus Bigelow, C. J., said: "The right of contribution does not arise out of any contract or agreement between co-sureties to indemnify each other, but on the principle of equity which courts of law will enforce, that where two persons are subject to a common burden it shall be borne equally between them. In such cases, the law raises an implied promise from the mutual relation of the parties. . . . It is sufficient that they were under obligation to pay the same debt as sureties for a third person": *Warner v. Morrison*, 3 Allen, 566. And similar hints have been dropped in *Powers v. Nash*, 87 Me. 322, 326.

From whatever source the right of contribution springs, the original contract is the bed-rock on which the whole superstructure rests, and to which reference must be made for a starting-point, and for fixing the apportionment. A proper regard for the principle of *stare decisis* compels us to adhere to the decisions of our own court.

The liability of the defendant then originating in an implied contract of an earlier date than that of the insolvent law could not be affected by that law unless the claim was proved or was merged in the judgment of March, 1885. There is no suggestion that it was proved, and *Ross v. Tozier*, 78 Me. 312, and *Wilson v. Bunker*, 78 Id. 313, decide that it was not merged.

Moreover, the constitutional prohibition against laws impairing the obligation of contracts applies to implied contracts as well as to express contracts: *Fisk v. Jefferson Police Jury*, 118 U. S. 131.

Exceptions sustained.

SURETY WHO HAS PAID JUDGMENT IS ENTITLED TO CONTRIBUTION, notwithstanding the legal extinction of the judgment: *Nelson v. Fry*, 16 Ohio St. 552; 95 Am. Dec. 110.

WINCHESTER v. EVERETT.

[80 MAINE, 535.]

MARRIED WOMAN—FALSE IMPRISONMENT.—JUDGMENT CREDITOR IS NOT LIABLE in trespass for refusing, on notice that his debtor is a married woman, to release her from arrest already made by an officer on an execution regularly issued on a judgment recovered against her as a single woman before a court having complete jurisdiction.

James S. Wright, for the plaintiff.

F. O. Purington, and Savage and Oakes, for the defendant.

VIRGIN, J. This bill of exceptions presents the question, whether a judgment creditor is liable in trespass for refusing, on notice that his debtor is a married woman, to release her from arrest already made by an officer on an execution regularly issued on a judgment recovered against her as a single woman before a court having complete jurisdiction.

When the judgment was recovered, execution issued, and the arrest made, the statute provided that "no person shall be arrested on an execution issued on a judgment founded on a contract, when the debt is less than ten dollars" (R. S., c. 113, sec. 19), and "in all other cases, except where express provision is by law made to the contrary, an execution shall run against the body of the judgment debtor, and he may be imprisoned thereon": R. S., c. 113, sec. 20. To this general provision, an "express provision is by law made to the contrary," by Revised Statutes, chapter 61, sections 4 and 5, which provide, in substance, that a married woman may make contracts for any lawful purpose, prosecute suits at law or in equity, and her property may be attached and taken on execution, but "she cannot be arrested on writ or execution." Yet, as the judgment was founded on a lawful contract, and the debt was not less than ten dollars, her arrest would have

been strictly in accordance with the foregoing statutory provisions, provided she had been in fact a "single woman," as she was described in the original writ, judgment, and execution.

Does it necessarily follow that her arrest can be the foundation of an action for false imprisonment because she was in fact a married woman when arrested, and the statute absolutely exempted her from arrest? Had she been described as a married woman in the execution, it might have been void on its face and her arrest unauthorized, the same as if the debt were less than that which authorizes the execution to run against the body: *Green v. Morse*, 5 Me. 292; *Smith v. Cattel*, 2 Wils. 376; *Brooks v. Hodgkinson*, 4 Hurl. & N. 712; which is not this case.

For the execution on which she was arrested described her as a "single woman"; personal service of the writ was made on her, and she appeared by counsel; and without making any suggestion that she was in fact other than as described in the writ, she suffered the action, after several continuances, to go to judgment on default, and only suggested her coverture after she was arrested and taken to the place where the jail was situated.

The execution being "fair on its face," and having been issued by a tribunal having complete jurisdiction of the subject of the suit and of the parties, the officer was protected in following its mandate; for when armed with such a process, the justification of the officer is essential to the securing of a due, prompt, and energetic execution of the law's behests: *Cameron v. Lightfoot*, 2 W. Black. 1190; *Nichols v. Thomas*, 4 Mass. 232; *State v. McNally*, 34 Me. 210; 56 Am. Dec. 650; *Gray v. Kimball*, 42 Me. 299; *Savacool v. Boughton*, 5 Wend. 170; *Erskine v. Hohnbach*, 14 Wall. 613.

At an early day the English courts, and more recently many of the courts in the United States, have had before them numerous cases of false imprisonment against the respective parties who caused the arrests, in which three distinct principles have been enunciated.

1. A writ on execution, void for want of jurisdiction or otherwise, can be no justification to a party thereto for any action under it; as, where the debtor was arrested on a writ or execution wherein the debt was less than that authorizing an arrest: *Green v. Morse*, *supra*; *Smith v. Cattel*, *supra*; or where an administratrix was arrested on an execution with-

out suggestion of *devastavit*: *Barker v. Braham*, 8 Wils. 368; or where a term intervened between the teste and the return of a writ on which the defendant was arrested: *Parsons v. Loyd*, 3 Id. 341. So, in case of arrest on execution issued after the judgment was paid: *Bates v. Pilling*, 6 Barn. & C. 88; or discharged under the insolvency statute: *Deyo v. Van Valkenburg*, 5 Hill, 242; although in the latter case, it seems, the officer would not be liable even if the defendant showed his discharge before the arrest: *Willmarth v. Burt*, 7 Met. 257.

2. Where a process is not void, but only voidable for some irregularity in issuing it, the party is justified for acts done in accordance with it, provided it is never actually superseded; but when it is set aside for the irregularity, the party at whose instance it was issued becomes a trespasser for acts done under it while in force, as if no process had ever issued. Thus in trespass for false imprisonment of a certified bankrupt, Buller, J., said: "The original plaintiff would not be liable to an action of trespass till the writ is superseded, for till then it is a justification; after a *superseedeas* trespass will lie against the party, but still not against the sheriff. I take this to have been settled over and over again": *Tarlton v. Fisher*, 2 Doug. 671, 677; *Prentice v. Harrison*, 4 Ad. & E., N. S., 850. So where an execution is issued against an absent defendant without filing bond pursuant to statute, it is good till superseded: *Gard. Mfg. Co. v. Heald*, 5 Me. 381. So where the debtor was arrested on an execution issued more than a year after the date of the judgment, without a *scire facias* to revive it: *Codrington v. Lloyd*, 8 Ad. & E. 449; *Blanchenay v. Burt*, 4 Ad. & E., N. S., 707; *Kerr v. Mount*, 28 N. Y. 659, and cases there cited.

3. When the process is neither irregular nor void, but is simply erroneous, then the party is forever protected for whatever he had done under it before it is reversed. This rule has been said to be founded in public policy, that parties may be induced freely to resort to the courts for the enforcement of their rights and the remedy of their grievances, without the risk of undue punishment for their own ignorance of the law, or for the errors of courts: *Marks v. Townsend*, 97 N. Y. 590, 595. "It is incomprehensible," said Lord Kenyon in *Belk v. Broadbent*, 3 Term Rep. 185, "to say that a person shall be considered a trespasser who acts under a process of court." "There is a great difference," remarked Lord Chief Justice De Grey, "between erroneous process and irregular (that is to

say, void) process. The first stands valid and good until it be reversed; the latter is an absolute nullity from the beginning. The party may justify under the first until it be reversed, but he cannot under the latter, because it was his own fault that it was irregular and void at first": *Parsons v. Loyd*, 3 Wils. 341, 345.

So in *Philips v. Biron*, 1 Strange, 509, it was said that a plaintiff is not justified by a judgment (process?) set aside for irregularity as he is where reversed on error, "for in case of error it is no fault of the party, but of the court, and therefore binds till reversed." So where a process of attachment sued out by a party is afterwards set aside on appeal for error, the party is not liable for trespass under it; but when set aside for irregularity or bad faith in obtaining it, may be: *Williams v. Smith*, 14 Com. B., N. S., 108 Eng. Com. L. 594. Williams, J., said: "The master of the rolls came to the conclusion that the facts warranted the attachment. That opinion was pronounced by the lord justices upon appeal to be erroneous. That brings the case within that class of cases where it has been held that the party causing process to be issued is not responsible for anything that is done under it when the process is afterward set aside, not for irregularity, but for error." Wills, J., said: "It by no means follows, that because a writ of attachment is set aside, an action for false imprisonment lies against those who procured it to be issued. If that were so, this absurd consequence would follow, that every person concerned in enforcing the execution of a judgment would be held responsible for its correctness. When an execution is set aside on the ground of an erroneous judgment, the plaintiff or his attorney is no more liable to an action than the sheriff who executes the process is. In order to entitle the party against whom process issues to maintain an action for any intermediate acts done under it, he must show that it has been set aside by reason of some misconduct, or at least some irregularity on the part of the person who sued it out."

So where a plaintiff, notwithstanding an insolvent discharge exempting the defendant from execution, obtained a general judgment and procured an execution on which the defendant was arrested, the judgment was held to be simply erroneous, and protected the plaintiff from an action for false imprisonment: *Brown v. Crowl*, 5 Wend. 298. See also *Day v. Bach*, 87 N. Y. 56; *Marks v. Townsend*, *supra*, and the cases therein cited for illustrations of this rule.

Upon recurring to the process in the case at bar, as already seen, the court had full jurisdiction of the subject of the suit as well as of the parties; that none of the regular judicial methods or rules of practice were omitted from the suing out of the writ to and including the service of the execution; but all was regular and in strict conformance with the law and facts presented in the case. "The plaintiff's exemption from imprisonment," said Morton, C. J., in *Cassier v. Fales*, 139 Mass. 461, 462, "under the writ, arises not from any irregularity or illegality in the writ, but from his personal privilege of infancy." The judgment and execution in this case at most were simply erroneous so far as they authorized her arrest, and all by reason of her omission to suggest her coverture when she had ample opportunity to do so. And so long as that judgment remains unreversed, any act done under it and in accordance with the execution duly issued on it is protected, whether done by the officer or the party. And the fact that this defendant was notified of the coverture was immaterial, for it could not then affect the validity of the judgment. The case of *Cassier v. Fales*, *supra*, we consider to be decisive of this on the ground that the violation of a personal privilege is no ground for an action for false imprisonment: *Deyo v. Van Valkenburg*, *supra*; *Smith v. Jones*, 76 Me. 138; 49 Am. Rep. 598.

We may add that the king's bench declined to discharge a married woman from arrest on execution, where, as in this case, being sued as a *feme sole*, she suffered judgment to go by default, and was subsequently arrested on the execution. On application for her discharge, Lord Chief Justice Tenterden said: "She must be left to her writ of error": *Moses v. Richardson*, 8 Barn. & C. 421. This case was followed by *Pool v. Canning*, L. R. 2 P. C. 241, where a married woman, being sued as a *feme sole*, pleaded coverture, but failing to sustain the plea by evidence, the verdict was against her. Willis, J., said: "There is no authority for extending the power of discharge to the case of one sued as a *feme sole* suffering judgment on default, or to a case of a married woman who pleaded her coverture and allowed the verdict to go against her on trial of that issue."

Moreover this court refused, on a writ of error, to reverse a judgment rendered on default against a husband and wife, there being nothing in the original writ to indicate the existence of such relation, the court held that she was sued as a

feme sole; and having neglected a fair opportunity to plead her coverture and make her defense, she cannot maintain a writ of error to reverse the judgment: *Weston v. Palmer*, 51 Me. 73.

Exceptions sustained.

LIABILITY OF OFFICER FOR ARREST. — An officer will not be justified by his writ if he arrests the wrong person, unless his mistake was made through misrepresentation of the person arrested: *Freeman on Executions*, sec. 460; *Dunston v. Paterson*, 2 Conn. B., N. S., 495; *Kelley v. Lawrence*, 3 Hurl. & C. 1; note to *Eames v. State*, 44 Am. Dec. 292.

NO ACTION LIES FOR ARREST ON CIVIL PROCESS of a witness returning home from court and privileged from arrest: *Smith v. Jones*, 76 Me. 138; 49 Am. Rep. 598.

LIABILITY OF PARTY PROCURING ARREST: See note, 54 Am. Dec. 264.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

LOVE v. STATE

[78 GEORGIA, 66.]

DURESS INVALIDATES CONTRACT FOR SALE OF PROPERTY where the free will of one of the parties is constrained, and his consent is induced by threats of the other party to do him bodily injury, and the party whose consent has been procured by duress cannot be convicted of larceny for subsequently removing the property alleged to have been sold by him.

TO VEST TITLE UNDER CONTRACT OF SALE OF PERSONAL PROPERTY, the agreement must ascertain the precise article to be delivered, the price must be agreed or paid, and where the quantity is to be taken from a bulk, it must be set apart and delivered, or there must be an agreement to consider it as belonging to and held for the purchaser. One who has entered into a merely executory contract for the sale of property, without having parted with the title thereto, cannot be convicted for stealing the property.

INDICTMENT for larceny. The defendant was convicted. The other facts are stated in the opinion.

Martin and Cochran, for the plaintiff in error.

O. C. Smith, solicitor-general, by *Harrison and Peeples*, for the state.

HALL, J. The question on which this case turns is, whether the contract between the defendant Love, and the prosecutor Grace, made on the 28th of December, 1885, conveyed the title to the corn alleged to have been stolen by the defendant, out of him, and placed it in Grace. If it did not so convey title, the defendant could not have been convicted of larceny from the house, and a verdict finding him guilty would be contrary to law. Whether the contract under which it is claimed the

title was conveyed to the prosecutor had that effect, will depend upon its validity and completeness.

1. It is scarcely doubtful that this contract and sale was the result of duress on the part of the prosecutor towards the defendant whose free will was constrained, and whose consent was induced by threats of the prosecutor to do him bodily harm. Those threats might have constrained his will, and actually have induced him to enter into this contract contrary to his will. If such were the case, it would not only avoid the contract, but do away with the sale which, it is alleged, was thereby affected: Code, secs. 2752, 2637, 2633; *Crawford v. Cato*, 22 Ga. 594; *Jones v. Rogers and Son*, 36 Id. 157. In both these cases the party who was induced to make the contract by duress was relieved from its operation and effect, and it was declared void in consequence of the illegal manner in which it was induced.

In this case the defendant was a negro, and a tenant of the prosecutor, who had borrowed from him corn made on the place the previous year, under agreement to return it at the end of the year 1885. The prosecutor had sold the defendant a mule, and at the time of the sale took from him a note for \$170, payable on the first day of October, 1885, and at the same time executed to him a mortgage on a mule, and the corn and fodder then on the place, consisting of one hundred bushels of corn and three stacks of fodder. This note and mortgage both bore date on the 15th of November, 1884, and the corn and fodder mentioned in them was that which the defendant was permitted to use, and which he promised to return at the end of 1885. It seems that the defendant, on the twenty-eighth day of December, 1885, had paid all the rent due to the prosecutor for the year 1885, and had also paid a store account which he owed him; but being unable to pay for the mule, he had delivered it to the prosecutor on that day, as he alleges, in satisfaction of the entire claim that the prosecutor had against him. The prosecutor insists that he was also to have the corn made on the place that year, and which was stored in the crib, in satisfaction of this claim. No price was agreed on for the corn or the mule, nor was the quantity of corn ascertained. The prosecutor supposed that there were ninety or a hundred bushels of corn in the crib, worth in the market sixty-five cents a bushel. This alleged contract was made on Saturday, and the prosecutor was to go on Monday to measure up the corn. At the same time the defendant

turned over to the prosecutor the key of the crib, which prosecutor redelivered to him to enable him to get out some clothing and meat that belonged to his family.

On the trial, the prosecutor swore that the defendant agreed to turn over to him all the corn and fodder in settlement of the demand he held against him. He testified that he cursed the defendant on Saturday, December 28th, and told him not to move the corn; said he ought to have cursed him more, and told him if he moved the corn he would hurt him. Borum, one of the state's witnesses, swore that he heard Grace, the prosecutor, say to the defendant that he would punish him if he moved the corn. The defendant replied that "he would have nothing more to do with it." Love, another witness for the state, swore that he was present on that day, and heard the prosecutor tell the defendant "if he moved the corn from the crib, he would get his meat." He was cursing the defendant, "and told him it was his corn, and not to move it, for if he did he would hurt him." The defendant, in his statement, said that Grace cursed him and had out his knife, and told him not to move it, or he would hurt him; not to move any of the corn or fodder, that he was going to take it; he was afraid all the time that Grace was going to hurt or kill him; he never did consent to his taking any corn or fodder, and never turned it over to him, or consented to his taking it. He swore he would kill him if he moved it, and would ask defendant if he heard him, and defendant would say he did. The defendant said that it was his corn, and that Captain Martin, his lawyer, told him he could move it, as he had never given it up; he never did consent that Grace should take his corn; Grace kept him afraid of him, and when he said he was going to take it, defendant was afraid to say he should not. Although the prosecutor had the right to rebut this statement, it is somewhat remarkable that he offered no evidence contradicting or explaining its material parts. Taking all the evidence together, it is quite plain that the defendant's consent to this arrangement was not free, and that his will might have been constrained by the threats, and his consent to it induced by the violent conduct of the prosecutor.

2. But had there been no violence or intimidation used on that occasion, and had the contract been fair and voluntary, it is not certain that it was sufficient to have vested the title to the corn agreed to be conveyed by it in the purchaser. To have this effect, it should have been executed; whereas it was

only executory. There was no cancellation or delivery of the note and mortgage held by the prosecutor to the defendant; no price was paid, and none agreed on. The quantity of corn contained in the crib had not been ascertained. This was to be done by measuring it on the following Monday. There was no estimate made by the parties as to the quantity contained in the crib. According to the mortgage, the quantity of corn loaned to the defendant was about one hundred bushels. So incomplete a contract could scarcely, under the well-settled rule of law, divest the defendant's title to the property in question, and vest it in the prosecutor. The principle that, in order to vest title under a contract of sale, the agreement must ascertain the precise article to be delivered, that the price should be agreed or paid, that where the quantity is to be taken from a bulk it should be set apart and delivered, or there should be an agreement to consider it as belonging to and held for the purchasers, seems to be well established, both by our own decisions and the decisions of other courts, and it has gone into the text-books on sales and contracts: *Bowers v. Anderson*, 49 Ga. 148; *Flanders and Huguenin v. Maynard*, 58 Id. 56; 1 Benjamin on Sales, sec. 408; Id., secs. 488, 508, and succeeding sections, *passim*.

That the defendant could not be indicted for stealing corn when he had not parted with the title, and had only entered into a contract to part with it, which was inchoate and not fully performed by either of the parties, we think is too plain to admit of doubt. To justify his conviction, the evidence should have removed all reasonable doubt upon this point as well as upon the question of the duress by which the defendant may have been induced to enter into the agreement. Justice, as it seems to us, requires a fuller investigation of these questions than this record discloses was had on the trial.

Judgment reversed.

DURESS WILL AVOID CONTRACT AT LAW OR IN EQUITY: See *Central Bank v. Copeland*, 18 Md. 305; 81 Am. Dec. 597, and note.

SALE OF GOODS IS COMPLETE, AND TITLE PASSES AT ONCE, where the seller makes a proposition and the buyer accepts, and the goods are delivered, and nothing remains to be done to identify them, or in any way prepare them for delivery: *Cleveland v. Williams*, 29 Tex. 204; 94 Am. Dec. 274; *South-western Freight etc. Co. v. Williams*, 44 Mo. 71; 100 Am. Dec. 255.

PARTY CANNOT BE GUILTY OF LARCENY OF HIS OWN PROPERTY, unless the person from whom it was taken had the right to possession: See extended note to *State v. Homes*, 57 Am. Dec. 278 et seq.

DANIELS v. STATE.

[78 GEORGIA, 92.]

ONE WHO ENTERS OPEN OUTER DOOR OF BUILDING, AND BREAKS OPEN INNER DOORS with intent to steal, may be convicted of burglary.

PLEA OF FORMER CONVICTION MUST BE SPECIAL, and for its support it is necessary to show the legal conviction of the defendant, on an indictment free from error, in a court having jurisdiction, and also the identity of the person convicted, and of the offense of which he was convicted. If such a plea is general, vague, and uncertain, is supported only by proof equally uncertain, and the former indictment upon which the defendant was alleged to have been convicted does not appear in the record, it should be overruled.

ALTHOUGH CONFESSION INDUCED BY THREATS IS NOT EVIDENCE, yet if it be attended by extraneous facts which show that it is true, any such facts thus developed, which go to prove the crime of which the defendant was suspected, will be received as testimony; and if such confession be proved true by the discovery to which it leads, it will be admissible; in case of larceny, however, the property must be identified by other evidence as that which was actually stolen.

INDICTMENT for burglary. The defendant pleaded the general issue; and further, that if he was guilty of said offense he had been convicted thereof under the charge of larceny from the house. The charge of the court, relating to the confession of the defendant, which is referred to in the opinion, is as follows: "One cannot be convicted on his confessions alone, if the confessions are illegally obtained. But if there are facts that come in as testimony that are consistent with that confession, then the jury may judge whether the confession is true or not. They have introduced some facts in connection with the confession; therefore the confession will remain in, to be judged of by the jury." Other facts are stated in the opinion.

F. R. Walker, for the plaintiff in error.

C. D. Hill, solicitor-general, *James Mayson*, and *W. P. Hill*, for the state.

HALL, J. 1. The indictment charges the defendant with breaking and entering the depot building of the Western and Atlantic Railroad Company, where valuable goods were contained, with intent to steal, etc. The proof showed that the outer door was left open, but that after getting into the building, which had numerous apartments, the doors to each of these, in which the postage-stamps belonging to the company were deposited, were broken and entered, and they were stolen and carried away by the defendant. It is now insisted that neither the charge in the indictment nor the facts in proof

made out the offense of burglary against the defendant; that in order to fix legal guilt upon him, it should have been alleged and proved that he effected his entrance by breaking the door through which he got into the house, and not by showing that after entering it, he broke either of the doors of the departments in it, where the valuables in question were found. Such, however, is not our apprehension of the law. It is well settled by a number of cases that where a party is indicted for breaking and entering an outhouse within the curtilage or protection of a mansion or dwelling, the burglary should be laid as having been done in the dwelling-house: 1 Wharton's Criminal Law, sec. 815, and citations. If this be true as to an outhouse within the protection of the mansion or dwelling-house, *a fortiori* would it be so as to an apartment in the house, a party's place of business in which his goods, wares, etc., were stored or contained, and which was broken and entered with an intent to commit a larceny upon the articles of value therein contained. This indictment does not allege in terms that the depot was the place of business of the railroad company, but no specific objection was taken to it on this account, and had there been one, we are not prepared to hold that it was tenable, as the offense, though not charged in the terms and language of the code, is so plainly set forth that its nature could be easily understood by the jury. It is always best, however, to avoid cavil or dispute, to conform to the very words of the statute on which the accusation is based. On this point, there was no error in the instruction given by the court.

2. Nor was there any error as to the defense attempted to be set up that the defendant had been previously convicted and punished for the act constituting the offense for which he was then on trial. There had been numerous pilferings of stamps and other articles from this and an adjacent building within the curtilage, so to speak, extending over a period of three or four weeks; some of them undoubtedly amounted to nothing more than larceny from the house, and of that offense the defendant had been convicted, but it is neither alleged nor shown by proof that the one for which he was tried and convicted was the burglary for which he was then being tried. The plea is general, when, by the requirements of the law, it should have been special; it necessarily consists of two matters, viz.: 1. Matter of record, to wit, the former indictment and conviction; and 2. Matter of fact, to wit, the identity of

the person convicted, and of the offense of which he was convicted. To support the first matter, it is necessary to show that the defendant was legally convicted on an indictment free from error, in a court having jurisdiction. These latter questions are to be determined by the court, but issue may be taken, not only upon the identity of the offender and the offense, but upon the existence of the record, and either or all these issues would have to be submitted to the jury: Wharton's Criminal Pleading and Practice, secs. 477-483. In these essential particulars, this plea is altogether deficient, nor is the proof offered to sustain it less uncertain, for even the former indictment upon which it was alleged that the defendant was convicted, although generally referred to as exhibit A, attached to the evidence, does not appear in this record. In its absence, we cannot determine that the court committed error in the disposition he made of it; the fair presumption is directly the contrary of this.

3. The remaining question is one of much more difficulty. Certain confessions of the defendant were given in evidence. After they had gone to the jury, it was ascertained that they had been improperly obtained, the defendant having been told that he had best make them. No preliminary investigation was had to test their competency, but when the testimony was nearly all in, his counsel moved to reject them; but while admitting that they had been obtained in an improper manner, the judge refused to reject them unconditionally, carefully instructing the jury as to the circumstances, extent, and purposes for which they should be treated as evidence, and if none of the facts which render them evidence existed, directing them to be rejected altogether. He informed the jury that if nothing more than the confessions thus improperly obtained had appeared in the evidence, he would not have permitted them to consider them at all, but that where the confession pointed to a substantive fact, from which guilt could be inferred or established, the law deemed it competent proof; and cautioning them that inference was not conviction, and that the independent facts brought to light by the confession must be established by other proof than the confession itself, they were permitted to consider the confession as a circumstance in connection with the facts thus developed in reaching a conclusion as to his guilt, of which they must be satisfied from all the evidence, including the fact that the confession was made beyond a reasonable doubt. "Although

confessions made by threats or promises," says Wharton's Criminal Evidence, sec. 678, "are not evidence, yet if they are attended by extraneous facts, *which show that they are true* [the Italics ours], any such facts thus developed, and which go to prove the crime of which the defendant was suspected, will be received as testimony; e. g., where the party thus confessing points out or tells where the stolen property is, or where he states where the deceased was buried, or gives a clew to other evidence which proves the case. But if, in consequence of the confession of the prisoner thus improperly drawn out, the search for the property or person in question proves ineffectual, no proof of confession or search will be received. And in case of larceny, the property must be identified by other evidence as that which was actually stolen." This succinct statement of the law is supported by a number of cases, English and American, referred to and cited in the foot-notes to the text. Two of these we especially invoke: *Laros v. Commonwealth*, 84 Pa. St. 200, where Chief Justice Agnew, who delivered the opinion of the court, pointedly says (p. 209): "An admission, not competent as a confession, is admissible when its truth is proved by the revelation of the fact by search." See also *Sampson v. State*, 54 Ala. 241. The discovery made in consequence thereof involves the admission of the confession so far as it relates to such discovery. The reason for rejecting confessions improperly obtained is their liability to prove false by reason of the motive which induces them, but when they are corroborated and confirmed by the discovery to which they lead, the reason for their rejection ceases, and *ratione cessante, ipsa lex cessat*. So far as we can understand the scope and bearing of this charge, it goes to this extent, and no further.

The failure to test the competency of the confession by an inquiry preliminary to their admission, thereby allowing them to make an improper impression upon the minds of the jury, doubtless influenced the presiding judge to deliver this charge, limiting and restraining the force and effect which such admissions would have without it, and was, in fact, more favorable to the defendant than if the motion of his counsel had prevailed, and the testimony, without more, had been rejected. We might, and probably ought to, have declined to consider the general exception made to this charge, in which no specific error is alleged or pointed out. If the case, in our opinion, had not been clear upon the proof, we should have been

less reluctant to interfere, and to arrest the execution of the sentence.

Judgment affirmed.

CONFESSIONS, ADMISSION OF IN EVIDENCE. — It is important to keep in mind the distinction between confessions and admissions. Greenleaf says: "In our law, the term 'admission' is usually applied to civil transactions, and to those matters of fact in criminal cases which do not involve criminal intent; the term 'confession' being generally restricted to acknowledgments of guilt": 1 Greenl. Ev., sec. 170. Currey, C. J., in delivering the opinion of the court in *People v. Strong*, 30 Cal. 151, 157, thus defines "confession": "A confession, in criminal law, is the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the same." And in delivering the opinion of the court in *People v. Parton*, 49 Id. 632, 637, McKinstry, J., said: "A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt": See also *People v. Velarde*, 59 Id. 461.

ADMISSIBILITY. — A confession freely and voluntarily made is not only admissible in evidence, but is evidence of the most complete and satisfactory nature. It is difficult to conceive how any person can voluntarily and freely confess himself guilty of the commission of a crime unless urged to do so by the promptings of truth and conscience. As, however, the history of criminal jurisprudence contains numerous well-authenticated cases in which persons accused of crime have confessed themselves guilty of imaginary and impossible crimes, and of crimes that were afterwards proved never to have been committed at all, it has become a well-established doctrine of English and American law that confessions of guilt should be received with caution, especially where the evidence offered is of verbal confessions. And the courts are very careful, before admitting confessions in evidence, to satisfy themselves that they were not made under the influence of hope or fear, or of any inducement that would be likely to lead the persons who made them to make an untrue confession. The admissibility or inadmissibility of a confession is to be determined by ascertaining whether or not it was induced by such means as would be likely to make the accused confess that he had committed a crime which in fact he did not commit; *Commonwealth v. Knapp*, 9 Pick. 496; 20 Am. Dec. 491; *Joy on Confessions*, 51. It is a well-established rule of evidence that confessions freely and voluntarily made by persons accused of crime are admissible in evidence against them: *Hopt v. Utah*, 110 U. S. 574; *Lawson v. State*, 20 Ala. 65; 56 Am. Dec. 182; *Carroll v. State*, 23 Ala. 28; 58 Am. Dec. 282; *Briester v. State*, 26 Ala. 129; *Porter v. State*, 55 Id. 99; *People v. Mortier*, 58 Cal. 262; *People v. Brown*, 59 Id. 345; *State v. Darnell*, 1 Houst. C. C. 321; *Cook v. State*, 11 Ga. 53; 56 Am. Dec. 410; *State v. Grant*, 22 Ms. 171; *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 501; *State v. Staley*, 14 Minn. 105; *People v. McMahon*, 15 N. Y. 384; *People v. Wentz*, 37 Id. 303; *State v. Howard*, 92 N. C. 772; *State v. McDonald*, 73 Id. 346; *Commonwealth v. Hanlon*, 3 Brewst. 461; *State v. Kirby*, 1 Strobb. 155; *Allen v. State*, 12 Tex. App. 190; *Womack v. State*, 16 Id. 178; *Smith v. Commonwealth*, 10 Gratt. 734; *Shifflet v. Commonwealth*, 14 Id. 652. And such a confession is not inadmissible merely because it was made in reply to a question which assumed the guilt of the accused: *Carroll v. State*, 23 Ala. 28; *People v. Wentz*, 37 N. Y. 303. Nor is a voluntary confession inad-

missible because the person to whom it was made promised that he would not say anything about it: *State v. Darnell*, 1 Houst. C. C. 321. And a confession is regarded as voluntary when it proceeds from the spontaneous expressions of the mind, free from the influence of any extraneous disturbing cause: *People v. Wentz*, 37 N. Y. 303; *People v. McMahon*, 15 Id. 384. A confession is not inadmissible merely because the accused, in making it, was actuated by the belief that he was suspected of the crime, and in danger of being prosecuted for it: *Allen v. State*, 12 Tex. App. 190. And that kind of fear that will render a confession inadmissible must be something more than the fear that is produced by the fact that the person was accused of a crime, and arrested or taken into custody: *Commonwealth v. Mitchell*, 117 Mass. 431; *Commonwealth v. Smith*, 119 Id. 305; *Commonwealth v. Freese*, 140 Id. 276; *Honeycutt v. State*, 8 Baxt. 371.

ADMISSIBLE, THOUGH MADE TO OFFICER HAVING PRISONER IN CUSTODY. — A confession voluntarily made, without the influence of hope or fear, is admissible in evidence, although it was made by a party under arrest, and to the person having him in custody at the time: *Hopt v. Utah*, 110 U. S. 574; *United States v. Nardello*, 4 Mackey, 508; *Franklin v. State*, 28 Ala. 9; *King v. State*, 40 Id. 314; *Meinaka v. State*, 55 Id. 47; *Redd v. State*, 69 Id. 255; *McElroy v. State*, 75 Id. 9; *People v. Long*, 43 Cal. 444; *People v. Rodondo*, 44 Id. 538; *People v. Ramirez*, 56 Id. 533; *State v. Ingram*, 16 Kan. 14; *State v. Alphonse*, 34 La. Ann. 9; *Commonwealth v. Freese*, 140 Mass. 276; *State v. Simon*, 50 Mo. 370; *State v. Rush*, 95 Id. 199; *People v. Rogers*, 18 N. Y. 9; 72 Am. Dec. 484; *People v. Wentz*, 37 N. Y. 303; *Murphy v. People*, 63 Id. 590; *Balbo v. People*, 80 Id. 484; *Cox v. People*, 80 Id. 500; *People v. McKoin*, 91 Id. 241; *People v. McCallam*, 103 Id. 587; *State v. Jefferson*, 6 Ired. 305; *State v. Houston*, 76 N. C. 256; *State v. Suggs*, 89 Id. 527; *State v. Howard*, 92 Id. 772; *Honeycutt v. State*, 8 Baxt. 371; *Harris v. State*, 6 Tex. App. 97; Wharton on Criminal Evidence, sec. 662. In delivering the opinion of the court in *Cox v. People*, 80 N. Y. 515, Andrews, J., said: "It is not sufficient to exclude a confession by a prisoner that he was under arrest at the time, or that it was made to the officer in whose custody he was, or in answer to questions put by him, or that it was made under hope or promise of a collateral nature." In *Franklin v. State*, 28 Ala. 9, a confession of guilt voluntarily made by the accused to the officer after his arrest, and while his hands were tied, was held to be admissible. And in *King v. State*, 40 Id. 314, a confession made to the officer after the prisoner's arrest was admitted, although the officer had told him, "If you know anything about the circumstances, it will be best to tell the truth about it." In *State v. Ingram*, 16 Kan. 14, a confession made by the prisoner to the officer in whose custody he was was held to be admissible, although at the time it was made there was a crowd surrounding the building in which he was confined. And in *Honeycutt v. State*, 8 Baxt. 371, a confession made to the officer by the prisoner after his arrest, and after a promise made to him by the officer that he would protect him, was held admissible, although there was some excitement in the crowd around him at the time. In *People v. McCallam*, 103 N. Y. 587, while the officers were making a search of the defendant's house for the stolen property, one of them said to her that she might as well own up, as they had proof sufficient to convict her, and that she might consider herself under arrest, her confession made under these circumstances was held to be admissible, the statements of the officer being held not to amount to a threat. But in Texas, a confession made by a prisoner to the officer having him in custody, to be admissible in evidence must be voluntarily made after he has

been warned that it may be used against him: *Thompson v. State*, 19 Tex. App. 593.

CONFESSION BY ONE ILLEGALLY IMPRISONED.—Some doubt has been thrown upon the admissibility of a confession made to an officer by a person under illegal imprisonment at the time: 1 Greenl. Ev., sec. 230. But the weight of authority seems to be in favor of the doctrine that such confession, if voluntarily made, is admissible: *Rex v. Thornton*, 1 Moody C. C. 27; *People v. Devine*, 46 Cal. 45; *Balbo v. People*, 80 N. Y. 484. In discussing this question in *Balbo v. People*, *supra*, Andrews, J., who delivered the opinion of the court, said: "We perceive no principle upon which it can be held that the confession, if otherwise admissible, can be rejected for the reason that the officer to whom it was made held the prisoner in custody upon an invalid process, or without any process or lawful right. The confession, if voluntary, is admissible, whether made to an officer or private person. The fact that the arrest was illegal has no relevancy, if the confession was voluntary. The people are not precluded from availing themselves of a voluntary confession because the officer or person to whom it was made was exercising an illegal restraint over the prisoner at the time."

QUESTION OF ADMISSIBILITY IS FOR COURT.—It is the province of the court, and not of the jury, to determine whether or not a confession offered in evidence should be received or rejected. And this question the court should determine upon a consideration of the age, character, condition, and situation of the prisoner at the time when the confession was made: 1 Bishop's Criminal Procedure, secs. 1220, 1236; Wharton on Criminal Evidence, sec. 689; 1 Greenl. Ev., sec. 219; *United States v. Nardello*, 4 Mackey, 503; *Bob v. State*, 32 Ala. 560; *Ward v. State*, 50 Id. 120; *Washington v. State*, 53 Id. 29; *Runnells v. State*, 28 Ark. 121; *People v. Jim T4*, 32 Cal. 60; *People v. Ah How*, 34 Id. 218; *Simon v. State*, 5 Fla. 285; *Earp v. State*, 55 Ga. 136; *State v. Fidment*, 35 Iowa, 541; *Nicholson v. State*, 38 Md. 140; *Commonwealth v. Freece*, 140 Mass. 276; *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 501; *State v. Staley*, 14 Minn. 105; *Simmons v. State*, 61 Miss. 243; *State v. Squires*, 48 N. H. 304; *Boyd v. State*, 2 Humph. 39; *Regina v. Garner*, 1 Den. C. C. 329. And if, after a confession has been admitted, it is shown not to have been voluntarily made, the court should withdraw it from the jury: *Simon v. State*, 5 Fla. 285. And although the confession be admitted without objection or motion to rule it out, the court may be asked to instruct the jury that confessions must be voluntary, and without the slightest hope of benefit, or the remotest fear of injury: *Earp v. State*, 55 Ga. 136. But a judge cannot be called upon to instruct the jury that the confession of a party accused of felony should be received with very great caution, and that they should hesitate to convict upon such confession, uncorroborated by other circumstances, unless the facts in evidence in the case make such a charge applicable: *Jones v. State*, 13 Tex. 168; 62 Am. Dec. 550. It was held in *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501, that while, in cases free from doubt, it is the province of the court to determine whether or not a confession was voluntary, yet where there is a conflict in the testimony or room for doubt, the court should submit the question to the jury, with instructions that if they were satisfied that there were inducements they should disregard the confession.

BURDEN OF PROOF THAT CONFESSION WAS VOLUNTARY.—Before a confession can be received in evidence, it must be shown that it was voluntarily made: 1 Greenl. Ev., sec. 219; *Bonner v. State*, 55 Ala. 242; *Redd v. State*, 69 Id. 255; *Owen v. State*, 78 Id. 425; *People v. Rodriguez*, 10 Cal. 50; *People*

v. *Soto*, 49 Id. 67; *State v. Garvey*, 23 La. Ann. 925; 26 Am. Rep. 123; *State v. Johnson*, 30 La. Ann., pt. 2, 881; *State v. Brockman*, 46 Mo. 466; *Cole v. State*, 18 Tex. 387. Said Wagner, J., delivering the opinion of the court in *State v. Brockman*, 46 Mo. 569: "Whilst a confession freely and voluntarily made may furnish the most complete and satisfactory evidence, yet its admissibility should depend upon its being free from suspicion that it was obtained by threats of severity or promises of favor, and of every influence whatever." And it seems that it is incumbent upon the state to prove preliminarily that the confession was voluntary: *Amos v. State*, 83 Ala. 1; 3 Am. St. Rep. 682; *Love v. State*, 22 Ark. 336; *People v. Soto*, 49 Cal. 67. In delivering the opinion of the court in the case last cited, Crockett, J., said: "When such a confession is offered in a criminal case, it is incumbent on the prosecution to lay the foundation for its introduction by preliminary proof showing *prima facie* that it was freely and voluntarily made. No such proof was offered in this case, and the court erred in admitting the confession in evidence without any showing on this point." In Alabama it is held that all confessions are *prima facie* involuntary and inadmissible, and that they can be rendered admissible only by showing that they were voluntary, and not constrained: *Sampson v. State*, 54 Ala. 241; *Young v. State*, 68 Id. 569; *Redd v. State*, 69 Id. 255; *Amos v. State*, 83 Id. 1; 3 Am. St. Rep. 682.

Some cases, however, hold that confessions are, in the absence of all evidence to the contrary, presumed to have been voluntarily made: *Eberhardt v. State*, 47 Ga. 598; *Commonwealth v. Culver*, 126 Mass. 464; *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 501.

If the accused fails to make objection to the introduction of the confession when it is offered in evidence, it will then devolve upon him to show that it was not voluntary, unless it appears from the evidence itself that the confession was obtained by means of promises or threats: *People v. Rodriguez*, 10 Cal. 50; *People v. Long*, 43 Id. 444; *State v. Davis*, 34 La. Ann. 351.

In Massachusetts it is the practice for the judge, if he admits the confession, to instruct the jury that they may consider the evidence, and that they should exclude the confession, if, upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant: *Commonwealth v. Coffey*, 108 Mass. 285; *Commonwealth v. Smith*, 119 Id. 305; *Commonwealth v. Piper*, 120 Id. 185; *Commonwealth v. Nott*, 135 Id. 269; *Commonwealth v. Freese*, 140 Id. 276. Where nothing can be shown as to the motives that prompted the accused to make the confession, it will be admitted in evidence: 1 Bishop's Criminal Procedure, sec. 1222; *Stallings v. State*, 47 Ga. 572; *Commonwealth v. McCann*, 97 Mass. 580; *State v. Patterson*, 68 N. C. 292; *Rufer v. State*, 25 Ohio St. 464; *Rea v. Cleaves*, 4 Car. & P. 221.

If the defendant objects to the admission of a confession on the ground that it was not free and voluntary, but was the result of threats made, and inducements held out to him prior to the making of it, by the officers of the law, who had him in custody, and offers to introduce evidence in support of his objection, it is error for the court to deny him the opportunity to show affirmatively that the confession was not voluntary: *People v. Soto*, 49 Cal. 67.

WHEN INADMISSIBLE. — A confession obtained through the influence of hope or fear, or extorted by means of threats or promises, cannot be admitted in evidence. As was said by Eyre, C. B., in *Rea v. Warwickhall*, 1 Leach C. C. 263: "A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it,

and therefore it is rejected": *Johnson v. State*, 59 Ala. 37; *People v. Smith*, 15 Cal. 409; *People v. Ah Hwe*, 34 Id. 218; *People v. Johnson*, 41 Id. 452; *People v. Barric*, 49 Id. 342; *Simon v. State*, 5 Fla. 285; *Frain v. State*, 40 Ga. 529; *Austine v. People*, 51 Ill. 239; *State v. Chambers*, 39 Iowa, 179; *Garrard v. State*, 50 Miss. 147; *Hector v. State*, 2 Mo. 160; 22 Am. Dec. 454; *State v. Brockman*, 46 Mo. 566; *State v. Guild*, 10 N. J. L. 163; 18 Am. Dec. 404; *Hendrickson v. People*, 10 N. Y. 13; 61 Am. Dec. 721; *Warren v. State*, 29 Tex. 369; *Womack v. State*, 16 Tex. App. 178; *State v. Phelps*, 11 Vt. 116; 34 Am. Dec. 672; *State v. Walker*, 34 Vt. 296.

WHETHER INDUCEMENT MUST BE BY PERSON IN AUTHORITY. — All the authorities agree that a confession made upon an inducement by a person in authority, or by another person under such circumstances as would justify the accused in assuming that it was held out by his sanction, is inadmissible in evidence. Sheriffs, constables, policemen, magistrates, prosecuting attorneys, the master or mistress of the accused, the prosecuting witness, or the person likely to prosecute the accused, are all regarded as persons in authority: Wharton on Criminal Evidence, sec. 650; Joy on Confessions, 5; *Res v. Thompson*, 1 Leach C. C. 291; *Res v. Upchurch*, 1 Moody, 465; *Res v. Parratt*, 4 Car. & P. 570; *Res v. Thomas*, 6 Id. 353; *Res v. Partridge*, 7 Id. 553; *Regina v. Drew*, 8 Id. 140; *Regina v. Laughner*, 2 Car. & K. 225; *Regina v. Garner*, 1 Den. C. C. 329; *Regina v. Luckhurst*, 6 Cox C. C. 243; *Regina v. Bate*, 11 Id. 686; *Regina v. Doherty*, 13 Id. 23; *Regina v. Fennell*, L. R. 7 Q. B. D. 147; *Ward v. State*, 50 Ala. 120; *Redd v. State*, 69 Id. 255; *Kelly v. State*, 72 Id. 244; *People v. Barric*, 49 Cal. 342; *Berry v. United States*, 2 Col. 186; *State v. Bostick*, 4 Harr. (Del.) 563; *Earp v. State*, 55 Ga. 136; *Eyre v. State*, 68 Id. 661; *Rector v. Commonwealth*, 80 Ky. 468; *Commonwealth v. Nott*, 135 Mass. 269; *State v. Staley*, 14 Minn. 105; *Simmons v. State*, 61 Miss. 243; *State v. Hagan*, 54 Mo. 192; *State v. Patterson*, 73 Id. 695; *State v. York*, 87 N. H. 175; *People v. Phillips*, 42 N. Y. 200; *Self v. State*, 6 Bart. 244; *State v. Walker*, 34 Vt. 296; *Vaughan v. Commonwealth*, 17 Gratt. 576. The following expressions made to the accused by persons in authority have been held to be such inducements as rendered the confessions inadmissible: "Unless you give me a more satisfactory account, I will take you before a magistrate"; "Tell me where the things are, and I will be favorable to you": *Res v. Thompson*, 1 Leach C. C. 291; "You had better split, and not suffer for all of them": *Res v. Thomas*, 6 Car. & P. 353; "I should be obliged to you if you would tell us what you know about it; if you will not, of course we can do nothing": *Res v. Partridge*, 7 Id. 553; "You had better tell the truth, it may be better for you": *Regina v. Garner*, 1 Den. C. C. 329; *Regina v. Bate*, 11 Cox C. C. 686; *Regina v. Doherty*, 13 Id. 23; *Regina v. Fennell*, L. R. 7 Q. B. D. 147; "She did not expect to do anything with her" (the accused), spoken by the mistress of the accused: *State v. Bostick*, 4 Harr. (Del.) 563; "You shall not be hurt": *Earp v. State*, 55 Ga. 136; "If he would bring up the meat there was a probability that the whole matter could be settled," spoken by the person from whom the meat had been stolen: *Byrd v. State*, 68 Id. 661; "He would not prosecute him heavy": *Rector v. Commonwealth*, 80 Ky. 468; "You had better own up. I was in the place when you took it; we have got you down fine; this is not the first you have taken; we have got other things against you nearly as good as this": *Commonwealth v. Nott*, 135 Mass. 269; "If you are guilty you had better own it": *State v. York*, 87 N. H. 175; "The best he could do would be to own up; it would be better for him": *People v. Phillips*, 42 N. Y. 200; "You had better tell all about it": *Vaughan v. Commonwealth*, 17 Gratt. 576. It will

be seen from these examples that a confession induced by the slightest inducement of either hope or fear, held out by a person in authority, is inadmissible. And where confessions are obtained from the accused by persons apparently acting with authority, by making him believe that he will get off easier by making them, such confessions will not be received: *People v. Wolcott*, 51 Mich. 612; *Smith v. State*, 10 Ind. 106; *Van Buren v. State*, 24 Miss. 512; *Jordan v. State*, 32 Id. 382; *State v. Whitfield*, 70 N. C. 356; *State v. Day*, 55 Vt. 510.

In England, the weight of authority favors the proposition that a confession is admissible in evidence, although an inducement has been held out, provided such inducement did not proceed from one in authority: *Joy on Confessions*, 23-33. And there are respectable authorities in this country that hold that, to make such confessions inadmissible, the inducement must have been held out by one in authority: *Wharton on Criminal Evidence*, sec. 660; *Young v. Commonwealth*, 8 Bush, 386; *Rice v. State*, 22 Tex. App. 654. But this rule does not seem to be so rigidly maintained here as in England: See *People v. Smith*, 15 Cal. 409; *Jordan v. State*, 32 Miss. 382. Perhaps a distinction should be made, in this respect, between inducements of hope and those of fear. A promise made by one in authority seems to stand upon a different footing from a promise by an outsider, who, without authority, undertakes to promise what it is clear he has no power to perform. But where a confession is induced by fear, it would seem to be equally inadmissible, whether the fear was produced by the threat of one in authority or of one not in authority. Bishop says that a confession induced by fear, produced by persons even though not in authority, is inadmissible. And this seems to accord with reason: 1 Bishop's *Criminal Procedure*, sec. 1237; and see *Jordan v. State*, 32 Miss. 382.

If the confession is not so connected with the inducement as to be a consequence of it, it will be admissible in evidence: *State v. Potter*, 18 Conn. 168. A confession made after these words were spoken to the prisoner was held to be admissible: "I wish you would tell me who murdered the boy, — pray split": *Rez v. Shaw*, 6 Car. & P. 372. And in *Fouts v. State*, 8 Ohio St. 98, it was held that a confession was not inadmissible because made by the prisoner after he had been advised that if he was guilty the confession could not put him in any worse condition, and that he had better tell the truth at all times. So in *State v. Freeman*, 12 Ind. 100, a confession made after the prisoner had been told that there was "no use in denying it, that the gold pieces had been found where he passed them, that he had better own up to it," was held admissible.

COLLATERAL INDUCEMENT. — An inducement, to render a confession inadmissible in evidence, must have reference to the prisoner's escape from punishment for the crime with which he is charged. A promise of some collateral favor will not have the effect of excluding the confession: *Rez v. Lloyd*, 6 Car. & P. 393; *State v. Wentworth*, 37 N. H. 218; *Cox v. People*, 80 N. Y. 500; *State v. Tatro*, 50 Vt. 483. In the case of *Rez v. Lloyd*, *supra*, the constable having the prisoner in custody said to him: "If you will tell where the property is, you shall see your wife." This was held not to be such an inducement as would render a confession, made after it was given, inadmissible. And in *State v. Tatro*, *supra*, the jailer promised the prisoner, who was chained and in solitary confinement, that he should be unchained and allowed to associate with the other prisoners if he would make a full confession. It was held that a confession induced by this promise was admissible in evidence.

CONFESSION INDUCED BY APPEAL TO MORAL OR RELIGIOUS SENTIMENTS.

— An appeal to the spiritual hopes and fears of the accused, or an exhortation, persuasion, or advice to him to confess, or to tell the truth, will not make a confession inadmissible, where no temporal benefit or advantage is promised, nor any hope of that kind held out to him: Joy on Confessions, 49, 56; 1 Bishop's Criminal Procedure, sec. 1225; Wharton on Criminal Evidence, secs. 647, 654; Reynolds's Stephen on Evidence, 2d ed., 41; *Res v. Gilham*, 1 Moody C. C. 186; *Res v. Wilde*, 1 Id. 452; *Res v. Gibney*, Jebb C. C. 15, 19; *Regina v. Sleeman*, 6 Cox C. C. 245; *Regina v. Jarvis*, L. R. 1 C. C. 96; *Regina v. Reeve*, 2 Id. 362; *Aaron v. State*, 37 Ala. 106; *Kelly v. State*, 72 Id. 244; *Commonwealth v. Drake*, 15 Mass. 161; *Commonwealth v. Fresco*, 140 Id. 276; *Hawkins v. State*, 7 Mo. 190; *State v. Fredericks*, 85 Id. 145; *State v. Crank*, 2 Bailey, 66; 23 Am. Dec. 117; *Mathews v. State*, 9 Lea, 123. The following expressions have been held not to render confessions inadmissible, under the rule we are considering: "Now, kneel you down, I am going to ask you a very serious question, and I hope you will tell the truth, in the presence of the Almighty": *Res v. Wilde*, *supra*; "Don't run your soul into sin, but tell the truth": *Regina v. Sleeman*, *supra*; "I should advise you that to any question that may be put to you, you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue": *Regina v. Jarvis*, *supra*; "You had better, as good boys, tell the truth": *Regina v. Reeve*, *supra*; "An honest confession is good for the soul"; *Mathews v. State*, *supra*.

CONFESSION INDUCED BY DURESS. — The employment of torture as a means of extorting confessions of guilt has always been illegal in England: Wills on Circumstantial Evidence, 90. And in this country it has been held to be an indictable offense to apply torture for the purpose of extorting a confession of guilt: *State v. Hobbs*, 2 Tyler, 380; Wharton on Criminal Evidence, sec. 646. Confessions extorted by duress are not voluntary, and are therefore inadmissible in evidence: *Young v. State*, 68 Ala. 569; *Hoover v. State*, 81 Id. 51; *State v. Chambers*, 39 Iowa, 179; *State v. Revells*, 34 La. Ann. 381; 44 Am. Rep. 436; *Flagg v. People*, 40 Mich. 706. In *Hoover v. State*, *supra*, the accused, who was a negro girl, seventeen years of age, of weak mental capacity, and of a humble and docile disposition, was locked up in the smoke-house by her mistress, who told her that she reckoned she would tell her about the crime, as she believed she knew all about it. The confession thus obtained from the accused was rejected. In *Young v. State*, *supra*, a large body of men took the prisoners out of the jail, and carried them to a place near the scene of the crime, where the confession was made. The confession was excluded, although no threats were made. In *State v. Revells*, *supra*, a body of eighteen or twenty armed men, not officers, took the accused, a young man about eighteen years of age, out of bed in the night-time, tied a rope around his arms, put a rope about his neck, and started to bring him back to the place where the crime had been committed. During the journey the accused, after being warned that his statements might be used against him on his trial, made a confession, which he repeated after the journey was ended. The court held that the accused "was not, and could not be, in a state of mind under which he could make a free and voluntary confession of guilt, uninfluenced by fear, or not alarmed by the dread of his numerous captors." In *Flagg v. People*, *supra*, the accused, a weak-minded man, was given whisky to drink, taken in irons to a lawyer's office, where, with bolted doors, he was interrogated in the presence of persons hostile to him. His confession was held to be inadmissible. In *State v. Chambers*, *supra*, the prisoner was taken

by a mob out of the hands of the officer, and threatened by them before he made a confession, which he afterwards repeated to some of the mob, who promised to protect him. Both confessions were held inadmissible. But where a private person said to the prisoner: "I know your father, and you had better tell me so I can tell him, so that he can help you," a confession made by the accused was held not to have been obtained by duress, and to be admissible: *Ulrich v. People*, 39 Mich. 245. So where a prisoner in custody said: "If the handcuffs are taken off I will tell you where I put the property," his confession made after the removal of the handcuffs was admitted: *Ree v. Green*, 6 Car. & P. 655.

OBTAINED BY ARTIFICE OR DECEPTION. — A confession is admissible in evidence, notwithstanding the fact that it has been obtained from the accused by a resort to artifice, deception, or falsehood. However reprehensible and dishonorable such means of obtaining a confession may be, yet if the confession is shown to have been voluntary, and not to have been made by reason of inducements that would be likely to lead the accused to make an untrue confession, it will be admitted in evidence against him: *Joy on Confessions*, 42; *Wharton on Criminal Evidence*, sec. 670; *Ree v. Derrington*, 2 Car. & P. 418; *Ree v. Thomas*, 7 Id. 345; *King v. State*, 40 Ala. 314; *Gates v. People*, 14 Ill. 433; *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 601; *State v. Staley*, 14 Minn. 105; *State v. Jones*, 54 Mo. 478; *State v. Phelps*, 74 Id. 123; *State v. Fredericks*, 85 Id. 145; *State v. Rush*, 95 Id. 199; *State v. Mitchell*, 1 Phill. (N. C.) 447; *Heldt v. State*, 20 Neb. 492; 57 Am. Rep. 835; *Commonwealth v. Hanson*, 3 Brewst. 461.

CONFESSION UNDER INTOXICATION. — The fact that the accused was intoxicated at the time he made the confession will not of itself exclude the confession: *Joy on Confessions*, 18; 1 Bishop's Criminal Procedure, sec. 1229; *Wharton on Criminal Evidence*, sec. 676; *Ekridge v. State*, 25 Ala. 30; *Lester v. State*, 32 Ark. 727; *People v. Ramirez*, 56 Cal. 533; *Commonwealth v. Howe*, 9 Gray, 110; *State v. Gear*, 28 Minn. 426; 41 Am. Rep. 296; *Whitney v. State*, 8 Mo. 165; *Williams v. State*, 12 Lea, 241; *Ree v. Spilsbury*, 7 Car. & P. 187. But the jury may consider whether or not the accused knew what he was doing at the time he made the confession: *Commonwealth v. Howe*, 9 Gray, 110.

STATEMENTS MADE IN SLEEP. — Words uttered by the accused while sleeping cannot be admitted in evidence against him as a confession: *People v. Robinson*, 19 Cal. 40; *Wharton on Criminal Evidence*, sec. 675.

CONFESSION SUBSEQUENT TO ONE INDUCED BY IMPROPER INFLUENCE. — Where a confession has been improperly obtained, a confession subsequently made is not admissible in evidence, unless there is reasonable ground to believe that, from the length of time that has intervened, from proper warning given to the accused of the consequences, or from other circumstances, the hope or fear that induced the former confession has been entirely dispelled. In such cases, the subsequent confession is presumed to have been made under the same influences that induced the former one, and it rests upon the prosecution to show that the contrary is the case: *Joy on Confessions*, 69; *Wharton on Criminal Evidence*, sec. 677; *Ree v. Sherrington*, 2 Lew. C. O. 123; *Ree v. Cooper*, 5 Car. & P. 535; *Regina v. Hewett*, Car. & M. 534; *Regina v. Bate*, 11 Cox C. C. 686; *Regina v. Doherty*, 13 Id. 23; *Regina v. Rue*, 13 Id. 209; *Porter v. State*, 55 Ala. 95; *Bonner v. State*, 55 Id. 242; *McAdory v. State*, 62 Id. 154; *Owen v. State*, 78 Id. 425; *Love v. State*, 22 Ark. 336; *People v. Johnson*, 41 Cal. 452; *Beery v. United States*, 2 Col. 186; *Simon v. State*,

5 Fla. 285; *State v. Chambers*, 39 Iowa, 179; *Commonwealth v. Knapp*, 9 Pick. 496; 20 Am. Dec. 491; *Commonwealth v. Taylor*, 5 Oush. 605; *Commonwealth v. Cullen*, 111 Mass. 435; *State v. Jones*, 54 Mo. 478; *State v. Guild*, 10 N. J. L. 163; 18 Am. Dec. 404; *People v. Robertson*, 1 Wheeler C. C. 66; *State v. Low-horne*, 66 N. C. 638; *State v. Winstingerode*, 9 Or. 153. And in *State v. Chambers*, 39 Iowa, 179, it was held that the lapse of ten months in jail was not conclusive that the improper influences under which the former confession was made had ceased to operate. But if it is evident from the testimony in the case that the effect of the prior improper influences had entirely ceased to operate before the subsequent confession was made, it will be admissible; *Brister v. State*, 26 Ala. 129; *Porter v. State*, 55 Id. 99; *People v. Jim Tt*, 32 Cal. 60; *State v. Soper*, 16 Mo. 293; 33 Am. Dec. 665; *Commonwealth v. Knapp*, 9 Pick. 496; 20 Am. Dec. 491; *People v. Barker*, 60 Mich. 277; 1 Am. St. Rep. 501; *State v. Guild*, 10 N. J. L. 163; 18 Am. Dec. 404; *State v. Frasier*, 6 Bart. 539; *Beggarly v. State*, 8 Id. 520.

EXTRANEOUS FACTS ASCERTAINED THROUGH INADMISSIBLE CONFESSION. —

Where the accused in making an involuntary confession makes statements of extraneous facts, and in consequence of the information thus obtained from him, the property stolen, or the instrument of the crime, or the bloody clothes of the victim, or any other material fact is discovered, it may be shown that the discovery was made conformably with the information given by the accused. It may be shown that the prisoner said that the thing would be found by searching a particular place, and to prove that it was so found, but not that the prisoner confessed that he had concealed it there: Joy on Confessions, 81; Greenl. Ev., sec. 231; 1 Bishop's Criminal Procedure, sec. 1242; Wharton on Criminal Evidence, sec. 678; 1 Phillips's Evidence, 554; Roscoe's Criminal Evidence, 50; *Rex v. Warickshall*, 1 Leach C. C. 263; *Rex v. Lockhart*, 1 Id. 386; *Regina v. Gould*, 9 Car. & P. 364; *Murphy v. State*, 63 Ala. 1; *People v. Hoy Yen*, 34 Cal. 176; *Gates v. People*, 14 Ill. 433; *Jane v. Commonwealth*, 2 Met. (Ky.) 30; *State v. Garvey*, 28 La. Ann. 925; 26 Am. Rep. 123; *Belote v. State*, 36 Miss. 96; 72 Am. Dec. 163; *Garrard v. State*, 50 Miss. 147; *United States v. Richard*, 2 Cranch C. C. 439. Ludeling, C. J., in delivering the opinion of the court in *State v. Garvey*, *supra*, said: "In the present case it was the confession itself which was objected to, and it should have been rejected. Whether the finding of the brickbat, stove-pile, and 'other facts' corroborated the alleged confession or not, is immaterial in considering the admissibility of the confession. These facts might have been proved, and even that they were discovered in consequence of information received from the accused, without making a confession, unduly obtained, admissible."

In Texas it is provided by statute that "the confession shall not be used, . . . or unless in connection with such confession he make statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or instrument with which he states the offense was committed"; Willson's Criminal Statutes of Texas, sec. 750. Under this statute it has been decided that where the extraneous statements of the accused have been found to be true, the confession, as well as the extraneous facts, is admissible; *Weller v. State*, 16 Tex. App. 200, overruling all prior contrary decisions; *Walker v. State*, 2 Id. 326; *Owens v. State*, 16 Id. 448; *Collins v. State*, 20 Id. 399. Ector, P. J., in delivering the opinion of the court in *Walker v. State*, 2 Tex. App. 337, said: "In this state, when a prisoner makes a statement of facts, and in consequence of such information the property stolen, the bloody clothes of the

defendant, or the instrument with which he says the offense was committed, or any other material fact, is discovered, such statement, together with the confession of the crime itself, is proper testimony to go to the jury." And see *Sampson v. State*, 54 Ala. 241; *Frederick v. State*, 8 W. Va. 685.

CONFESSION ON PROMISE TO ALLOW ACCUSED TO TURN STATE'S EVIDENCE. — A confession obtained from the accused by holding out to him the hope that he will be used as state's evidence if he confesses is not admissible: *Regina v. Gillis*, 11 Cox C. C. 69; *People v. Kurtz*, 42 Hun, 335; *Womack v. State*, 16 Tex. App. 178. And the fact that the prisoner afterwards refuses to keep his agreement to testify, and denies that he made such confession, will not render the confession admissible in evidence: *Regina v. Gillis*, *supra*; *Womack v. State*, *supra*. But in *Fife v. Commonwealth*, 29 Pa. St. 429, it was held that a declaration made by a jailer to a prisoner after her arrest, "that if the commonwealth should use any of them as witnesses, he supposed it would prefer her to either of the others" arrested and charged with the same offense, was not sufficient to exclude a voluntary confession made by such prisoner to a magistrate on the same day, after being cautioned that her confession might be used against her.

CONFESSION IS EVIDENCE ONLY AGAINST PERSON MAKING IT. — A confession is only admissible in evidence against the party himself who makes it, and is not admissible against another, jointly indicted with him, for any purpose: *Porter v. State*, 55 Ala. 95; *Metcalfe v. Conner*, Litt. Sel. Cas. 497; 12 Am. Dec. 340; *Priest v. State*, 10 Neb. 393.

WHOLE CONFESSION MUST BE ADMITTED. — If any part of a confession is introduced in evidence, the accused is entitled to have the whole of what he said admitted: 1 Bishop's Criminal Procedure, sec. 1241; *People v. Navis*, 3 Cal. 106; *People v. Murphy*, 39 Id. 52; *Harrison v. State*, 20 Tex. App. 387; *Brown v. Commonwealth*, 9 Leigh, 633; 33 Am. Dec. 263. A witness who has a very imperfect knowledge of the language in which the alleged confession was made, and who did not understand the whole of the conversation in which it was made, is not competent to testify as to such confession: *People v. Gelabert*, 39 Cal. 663.

CONFESSION, WITHOUT PROOF OF CORPUS DELICTI. — Extrajudicial confessions of guilt, without proof of the *corpus delicti*, are insufficient to justify a conviction: 1 Bishop's Criminal Procedure, sec. 1068; 1 Greenl. Ev., sec. 217; Wharton on Criminal Evidence, sec. 632; Wills on Circumstantial Evidence, 88; *Matthews v. State*, 55 Ala. 187; 28 Am. Rep. 698; *People v. Jones*, 31 Cal. 565; *People v. Thrall*, 50 Id. 415; *May v. People*, 92 Ill. 343; *Williams v. People*, 101 Id. 382; *Cunningham v. Commonwealth*, 9 Bush, 149; *Stringfellow v. State*, 26 Miss. 157; *Robinson v. State*, 12 Mo. 592; *State v. Scott*, 39 Id. 424; *State v. German*, 54 Id. 526; 14 Am. Rep. 481; *Priest v. State*, 10 Neb. 393; *Commonwealth v. Haslon*, 3 Brewst. 461; *Gray v. Commonwealth*, 101 Pa. St. 380; 47 Am. Rep. 733. But if there be sufficient evidence of the *corpus delicti* to satisfy the minds of the jury, then the confession of the accused will be sufficient to justify a conviction: *Winslow v. State*, 76 Ala. 42; *State v. Patterson*, 73 Mo. 695. A judicial confession is sufficient without proof of the *corpus delicti*: *State v. Lamb*, 28 Id. 218.

WHAT CONSTITUTES "BREAKING" SO AS TO RENDER PARTY GUILTY OF BURGLARY: See the extended note to *People v. Richards*, 2 Am. St. Rep. 373 et seq.

CONVICTION OF FELONY BARS FURTHER PROSECUTION WHEN: See extended note to *Orenshaw v. State*, 17 Am. Dec. 791 et seq.; *Kohlheimer v. State*, 39 Miss. 548; 77 Am. Dec. 696, 697.

HOUSTON v. BRYAN.

[78 GEORGIA, 181.]

EVIDENCE TO SHOW WHO TAKES AS "CHILD" IN TRUST DEED. — Where a woman of such an age that there is no possibility of her having future issue purchases land, and has it conveyed to a trustee in trust for her sole and separate use for her natural life, and after her death to such child or children as she may leave living at the time of her death, evidence that she had no children of her own, that a daughter of a former husband always lived with her, and was always recognised by her as her child, that there was no other person in being when the deed was made, or afterwards, to fill the description of her child as used therein, and that a part of the money paid for the property was probably derived from said former husband, is sufficient to show that said daughter was the person intended to take in remainder after the death of the *cestui que vie*. This is a case of latent ambiguity rather than of mistake as to the person designated as beneficiary in the deed.

PAROL EVIDENCE IS ADMISSIBLE TO APPLY DESCRIPTION OF PERSON GIVEN IN DEED so as to ascertain the particular person intended to be embraced in that description, and to explain all latent ambiguities, and the evidence required for that purpose need not be of the same high character and tendency as that which would be required to authorize the correction of a mistake therein.

PURCHASE BY ADMINISTRATOR AT HIS OWN SALE IS VOIDABLE at the option of any party interested in the property, whether the sale be made directly to him or through the interposition of another person.

ADMINISTRATOR IS NOT BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE, so as to entitle him to an allowance for his improvements, where he sells land in which he knows that his intestate had no interest therein upon which he could administer, and becomes the purchaser at his own sale. And, in an action brought against him by the person entitled to such property, for the recovery thereof, he will not be allowed for his improvements, except as a set-off against means profits.

BILL in equity. The opinion states the case.

Jackson and Whitley, and Du Bignon and Fraser, for the plaintiffs in error.

J. R. Saussy and I. Beckett, for the defendant.

HALL, J. Diana Bryan exhibited her bill on the equity side of the court against U. L. Houston, both in his individual capacity and as administrator of Diana Jordan, deceased, and others, for the purpose of recovering a portion of a city lot situated in Savannah, which she alleged had been purchased at his own sale by the said Houston, administrator as aforesaid, not directly, but through the agency of another. She alleged that she was the child of one Alexander Cannon by a former wife; that Cannon was the husband of Diana, who, after his death, married Archie Jordan; that at the time

of Cannon's death he was a slave; that the then wife of the said Cannon was also a slave; that Cannon left with his said wife, Diana, at his death, eight hundred or a thousand dollars in specie, which he directed her to invest in a lot and building for the joint use of herself and his said wife during the life of the wife, and after her death to his said child, the complainant; that he had no children by his wife, the said Diana; that this money was kept until the slaves were manumitted; that after their manumission, the widow of Cannon intermarried with Archie Jordan, and that on the 2d of May, 1876, this money was invested by her in the property covered by the trust deed in question; that the trusts set forth and declared in said deed were wrongfully, ignorantly, and by mistake set forth and described as follows, to wit: "In trust for the sole and separate use of Diana Jordan for her natural life, and after her death to such child or children as she may leave living at the time of her death, share and share alike, with power to said Diana Jordan to authorize her trustee, the said Archie Jordan, to sell the whole or any part of the trust estate, and to reinvest the proceeds in such other property as she may deem best for the interest of said estate."

It appears that Diana Jordan had no children of her own, and had adopted and raised the complainant as her own child; that at the making of this deed, she had reached that period of life when there was no possibility of issue. The relation of parent and child had always, from her marriage with Cannon, existed between complainant and Diana Jordan. Archie Jordan died in 1882. No successor in the trust had been appointed, and at the death of Diana Jordan, which occurred in May, 1884, it was still vacant. Houston qualified as her administrator in June, 1884. Previous to her death, he had purchased from her trustee and herself a portion of the lot in dispute; and it appears that he had Diana Bryan, the complainant, to sign the deed conveying the land thus purchased. This signature was made by her mark, and whether she signed it as a witness simply, or as one of the feoffors, is somewhat doubtful. On the trial there was much conflicting evidence upon the issue made by the bill and answer. The jury, however, found the premises in favor of the complainant, and the court decreed in accordance with their finding. Thereupon a motion was made for a new trial on various grounds, which was refused, and the defendant brought the case here for review. It will not be necessary to consider all

the questions made by this record in order to dispose of the case.

1. Is there evidence sufficient to show that Diana Bryan was the party intended to take in remainder under this trust deed after the death of Diana Jordan, the *cestui que vie*? We think the circumstances make quite a clear case leading to this conclusion. It is certain that the trust property was purchased with funds furnished by Diana Jordan; but whether any portion of these funds was derived from the amount claimed to have been left by her former husband, Alexander Cannon, is, though not so clear, yet quite immaterial, though the probability, from the testimony, is, that some portions of that fund contributed to the purchase. In the next place, Diana Jordan claimed and treated no other person than the complainant as her child. Complainant always lived with her, and was always recognized by her as her child. There was no other person in being at the time or subsequent to the execution of the trust deed to fill the description of her child as used in that instrument, or to whom reference was probably made. That the testimony to establish a mistake in the execution of a solemn instrument of this character must be clear and satisfactory, admits of no dispute. The power to correct mistakes in a deed should be exercised with caution; and to justify it, the evidence should be clear, unequivocal, and decisive as to the mistake: Code, sec. 3117, and citations. But this is rather a latent ambiguity than a mistake as to the person designated as beneficiary in this deed, and who, under the circumstances, was intended by the designation "child or children of Diana Jordan" to take in remainder. She had never regarded any other person than complainant as sustaining to her that relation. It is admissible to apply, by parol testimony, the description given in an instrument so as to ascertain the particular person or persons intended to be embraced in that description. Indeed, parol evidence is admissible to explain all such ambiguities: Code, secs. 3801, 2757, 2457. And we are not prepared to hold that the evidence required to apply such an ambiguous description should be of the same high character and tendency as that which would authorize the correction of a mistake.

2. The disability of Alexander Cannon to acquire and transmit property on account of his slavery is not necessarily involved in this case. The fact that his widow, Diana Jordan, made this purchase and declared this trust after her

manumission, and when she was vested with full power and authority to enter into such a transaction, is sufficient to sustain the validity of the deed to the land purchased by her and conveyed to her trustee. She had the right to acquire, hold, and dispose of property. The source from she derived the money could have no bearing upon the issue, other than as it tended to show the probability of the trust being made in favor of complainant. For that purpose, it was admissible as evidence; and the jury had a right to consider it, with other proof in the case, as conducing to the conclusion which they reached.

3. It is familiar learning that a purchase made by an executor, administrator, or other trustee at his own sale, is voidable at the option of any party interested in the property, whether the sale be made directly to him or through the interposition of another person. There seems to have been great haste in administering this estate and winding up its affairs. The property was sold to a person who conveyed it, in a few days after, to the administrator. No money appears to have passed between them. The title was made by the administrator to the purchaser at the sale, when the property was immediately reconveyed to the person acting as administrator. It is evident that this administrator was apprised of the claim that complainant had on this property before he ever administered upon the estate, at least before he took possession of it, and made any improvements upon it. It would not be going too far to infer that he administered upon this estate with a view of procuring the remainder of the lot, a part of which he had previously purchased. There has, in fact, been no administration of this estate. Diana Jordan had nothing in this property to administer. Her interest in it terminated at her death. She had nothing but a life estate, and of that the defendant Houston seems to have been well apprised. The only portion of her estate, some household furniture and other personal effects of like character, that ought to have been administered, he suffered to be divided without administration among the heirs of her late husband, Diana Bryan, and certain of the collateral relations of Diana Jordan.

The claim set up by Houston for improvements made by him, any further than they served as a set-off against mesne profits, was wholly untenable. He was charged with notice, as we have seen, of complainant's rights in the land purchased at his own sale; besides, he knew that Diana Jordan had no

interest in it, on which he could administer. In no sense of the term was he a *bona fide* purchaser for value without notice, entitled to avail himself of the liberal rule in favor of such a purchaser as to the allowance of improvements: Code, sec. 3464, and citations; *Ruffin v. Paris*, 75 Ga. 653; *Nunn v. Burger*, 76 Id. 705. The notice brought home to Houston affected his conscience and made his purchase covinous (*Urquhart v. Leverett*, 69 Id. 92), independently of the legal fraud implied from the confidential relation in which he stood to the trust property and the complainant who claims it.

4. Though not absolutely required, we think this verdict sustained by the weight of the evidence, and that Judge Adams properly exercised his discretion in refusing to grant the new trial.

Judgment affirmed.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN AMBIGUITY IN DEED: *Schmitt v. Schmitt*, 19 Wis. 207; 83 Am. Dec. 681; as to identify person mentioned in the instrument: *Henderson v. Hackney*, 23 Ga. 383; 68 Am. Dec. 529.

WHO WILL TAKE UNDER WORD "CHILDREN": See *Cruss v. McKee*, 2 Head, 1; 73 Am. Dec. 186, and note.

PURCHASE BY EXECUTOR AT OWN SALE IS VOIDABLE at election of parties interested: *Smith v. Granberry*, 39 Ga. 381; 99 Am. Dec. 464, and note.

WRIGHT v. CITY COUNCIL OF AUGUSTA.

[78 GEORGIA, 241.]

MUNICIPAL CORPORATION IS NOT LIABLE FOR DAMAGE BY FIRE TO PROPERTY of a citizen, resulting from its failure to provide suitable apparatus and a sufficient supply of water to extinguish the flames, or from the inefficiency, carelessness, and neglect of its firemen, or of the officers in charge of them, and whose operations it is their duty to direct, although it levies a water tax annually, and engages to have constantly available an abundant supply of water for all purposes.

MUNICIPAL CORPORATION IS LIABLE FOR NEGLIGENCE ONLY IN CASES where the negligence or non-feasance of its ordinary agents and servants, as distinguished from that of its officers, causes the injury, or where the loss results from acts merely ministerial, as distinguished from such as are legislative and governmental in character, exercised for the sole and immediate benefit of the public, or where the corporation, as a corporation, is exercising its private franchise powers and privileges which belong to it for its immediate corporate benefit, or is dealing with property held by it for its corporate advantage, gain, or emolument, though inuring ultimately to the benefit of the general public.

ACTION for damages. The opinion states the case.

Leonard Phinizy and Salem Dutcher, for the plaintiff in error.

John S. Davidson, for the defendant.

HALL, J. Wright brought suit against the city council of Augusta, averring in his declaration that he was a citizen of Augusta, and owner of two adjacent houses therein; that, without fault on his part, one of them caught fire; that the fire department promptly appeared, but were unable to open the fire-plug for that locality with their usual appliances; that it was found necessary to send off after a monkey-wrench wherewith to open it, thus consuming much valuable time; that on the plug being finally opened, it was discovered there was no water in the main; that a special messenger was then dispatched to the city water-works, and a supply of water having been at last pressed into the main, the firemen at once extinguished the conflagration, but not until one of the plaintiff's houses had been wholly destroyed and the other much injured, to his damage twelve hundred dollars; that defendant is liable therefor; that it annually levies a large water-tax, and engages to have constantly available an abundant supply of water for all purposes; that it has in its employ certain officers, whose duty it is, under the city ordinances, to keep the fire-plugs in good order, and the mains filled with water at proper pressure; that on this occasion said officers failed and neglected to perform said duties, whereby plaintiff was endamaged as aforesaid; that on prior like occasions they had been similarly negligent; that such negligence had been reported, and was well known to defendant, prior to the fire on plaintiff's premises, but notwithstanding such knowledge defendant continued them in its employ; and since said fire, with full knowledge of their negligence thereat, still retains them. To this declaration the defendant demurred, upon the ground that it sets forth no legal cause of action against it, and the court sustained the demurrer, and dismissed the suit. To this judgment the plaintiff excepted, and this exception brings up the question for our determination.

Our attention has been directed to no case where a municipal corporation has been held liable for damage done to the property of a citizen in consequence of its failure to provide suitable engines and apparatus, or on account of defective cisterns, or an insufficient supply of water to extinguish the

flames, or the inefficiency, carelessness, and neglect of its firemen, or the officers in charge of them, and whose duty it is to direct their operations; while we have been furnished with a number of cases that hold they are not so liable, even where they have authority to levy and collect, and do levy and collect, a tax for that purpose.

"The exemption from liability," says Dillon (2 Municipal Corporations, 3d ed., sec. 976), "is placed upon the ground that the service is performed by the corporation in obedience to an act of the legislature,—is one in which the corporation has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed by the city corporation, are not the agents and servants of the city for whose conduct it is liable; but they act rather as the officers, of the city, charged with a public service, for whose negligence in discharge of official duty no action lies against the city without being expressly given; and the maxim *respondet superior* has therefore no application. Nor is such a corporation liable to the owners of property destroyed or damaged by fire in consequence of its neglect to provide suitable engines or fire apparatus, or to provide and keep in repair public cisterns. A liability on the part of the corporation was sought to be sustained upon the ground of the neglect of a corporate duty, but the court considered that powers of this nature were legislative and governmental, and excluded the notion of implied responsibility to individuals based on neglect or non-feasance, and distinguished the case from those in which the duty is purely ministerial." In *Black v. City of Columbia*, 19 S. C. 412, 45 Am. Rep. 785, the supreme court of South Carolina, in a well-considered and able judgment pronounced by McGowan, J., after a critical examination and exhaustive review of the cases upon the subject, reached the conclusion that "the city was not liable to a citizen for the destruction of his house by fire, owing to an inadequate supply of water, although it taxed him for water, and there was an understanding that there should always be an adequate supply for extinguishing fires." Whenever the negligence or non-feasance of the ordinary agents and servants of the corporation, as distinguished from that of its officers, causes the injury, or when the loss results from acts merely ministerial, as distinguished from such as are legislative and governmental in character, exercised for the sole and immediate benefit of the public, or where the cor-

poration is exercising, as a corporation, its private franchise powers and privileges, which belong to it for its immediate corporate benefit, or is dealing with property held by it for its corporate advantage, gain, or emolument, though inuring ultimately to the benefit of the general public, then, and only then, it becomes liable for the negligent exercise of such powers precisely as are individuals. This clear and essential distinction is sustained by a multitude of cases cited by the supreme court of Vermont, and many others which might have been added, in *Welch v. Village of Rutland*, 56 Vt. 228, 48 Am. Rep. 766 et seq., and effectively disposes of the citations of cases on the brief of the learned and indefatigable counsel for the plaintiff in error, where municipal corporations have been held liable for injuries to individuals, resulting from negligent construction and repairs of streets, bridges, canals, sewers, etc., and plainly points out the difference between these cases and such damage as may be occasioned by the negligent and careless conduct of those engaged in operating the fire department. The abrogation of such a distinction, and the failure to observe it in judicial proceedings, would, as it seems to us, be contrary to sound public policy, and tend to the serious embarrassment, if it did not bring about the utter insolvency, of municipal corporations; and such is the view which appears to have influenced the courts in making and enforcing it, as appears from the numerous decisions made, many of which have been brought to our notice in the argument. As we are of the opinion that there could have been no other judgment, under the law, than that rendered on the demurrer of the defendant, we must order the judgment affirmed.

MUNICIPAL CORPORATION IS LIABLE FOR NEGLIGENCE only where it performs ministerial acts, and not for injuries from legislative or judicial acts: *Dooley v. Sullivan*, 112 Ind. 451; 2 Am. St. Rep. 209; *McDade v. Chester*, 117 Pa. St. 414; 2 Am. St. Rep. 681. A city is not liable for loss by fire by reason of lack of water, where it is not bound by its charter to provide water for extinguishment of fires: See *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 664, citing many cases on this topic.

SMITH v. DU BOSE.

[78 GEORGIA, 412.]

PAST ILLEGIT COHABITATION DOES NOT RENDER VOID OR ILLEGAL GIFT by a man to the woman with whom he has held such relation.

CONTRACT TO MAKE COMPENSATION FOR INJURY DONE BY PAST ILLEGAL COHABITATION, which contains no stipulation for future intercourse, is not invalid, even though the intercourse be kept up after the contract has been fully executed, where there is no evidence of any promise or understanding other than that inferred from the fact of future illicit intercourse between the parties.

DEVISE TO NATURAL DAUGHTER OF TESTATOR, AND TO HER ILLEGITIMATE CHILDREN by a deceased friend of the testator, is not illegal, nor is it made so by any illicit intercourse between said daughter and one of the testator's executors, when there is no proof to charge the testator with knowledge of such intercourse, or to show that he in any way encouraged or promoted it, and where his will makes no provision for the carrying on of such intercourse, or for the maintenance of any offspring that might result therefrom.

RIGHTS AND LIABILITIES OF COLORED RACE IN RESPECT TO ILLEGIT INTER-COURSE are the same as those of the white race. And whatever rights and privileges belong to a white concubine, or to a bastard white woman and her children, belong also to a colored woman and her children. The same principles of law govern the rights of each race.

WHITE MAN MAY LAWFULLY MAKE COMPENSATION TO HIS COLORED PARAMOUR for past illegal cohabitation.

PUTATIVE FATHER MAY LAWFULLY MAKE PROVISION FOR HIS ILLEGITIMATE CHILD, or for the illegitimate offspring of such child, whether such child or offspring be white or colored.

COURT WILL NOT DECLARE TRANSACTION VOID ON GROUNDS OF PUBLIC POLICY, except in cases free from doubt. And what constitutes public policy, and what contravenes it, is a question of law for the court, and not one of fact for the jury.

WILL CANNOT BE SET ASIDE FOR ALLEGED MISREPRESENTATIONS, unless the representations are proved to have been false; and for the court to so charge the jury is not error. But to charge in addition that the representations must be proved to have been made in bad faith, and for the purpose of procuring the will, is erroneous. Where, however, the issue actually presented in the case was, whether or not the representations were false, where other portions of the charge limited and explained this instruction, where the court instructed the jury that if the representations were false the will should be set aside and declared void, and where the evidence in the case proved that the representations were not false, the verdict will not be set aside on that account, it being altogether probable that the jury could not have been misled or confused by the use of the terms employed.

APPEAL from an order admitting a will to probate. The facts are stated in the opinion.

N. J. Hammond, Hill and Harris, Bacon and Rutherford, R. W. Patterson, R. D. Smith, J. A. Harley, and T. M. Hunt, for the plaintiffs in error.

C. W. Du Bose, W. M. and M. P. Reese, John T. Jordan, and Reese and Little, for the defendants.

HALL, J. In response to a notice served by the executors of David Dickson, late of Hancock County, deceased, on his heirs and distributees, to show cause why his will should not be proved in solemn form, a portion of them appeared and caveated the probate, on the grounds,—1. That the will was procured by the undue influence of Amanda Dickson and her mother, Julia Dickson, or one of them; 2. That it was procured by the fraud of said Julia and Amanda in inducing said David Dickson to believe that said Amanda was his child, when she was not; and that her sons were the sons of Eubanks, when they were not; 3. That the whole paper is a scheme to carry into effect the last clauses of item 4, all of the seventh item, and all of the ninth item, relating to said Amanda and her said children, the alleged natural sons of Eubanks, which items are inconsistent with the laws or contrary to the policy of the state; and therefore the whole paper is void as a will, for this, and for the reasons stated in the *caveat* and this amendment; that if the whole is not void, said parts are void for said reason.

The other reasons stated in the original *caveat* of file were, that the paper was not David Dickson's will; that he had not testamentary capacity to make a will; that it was made under the undue influence and improper control exercised over him by Amanda Dickson; that it was made under a mistake as to his heirs of law, and was not such a will as he would have made had he known the facts, because the paper, was in its scheme and nature and tendency, illegal and immoral, and contrary to the policy of the state and of the law, and destructive and subversive of the interests and welfare of society.

The will was admitted to probate by the court of ordinary; and from this judgment the caveators appealed. On the appeal trial, all question as to the capacity of the testator to make a will was abandoned. The other grounds of the *caveat* were those relied on to defeat the probate of the will. On this trial, as well as that before the ordinary, the will was sustained, and a judgment was taken admitting it to probate and record.

The material questions discussed before this court were: 1. That the will was the result of the undue influence exercised by Amanda Dickson, one of the principal beneficiaries

under its provisions, and her mother, Julia Dickson, upon the testator; 2. That it resulted from false and fraudulent representations made by Amanda and Julia, not only as to the paternity of Amanda, but of Amanda's children, it being insisted that Amanda was not the child of the testator, and that her sons, Julian H. and Charles G., were not the natural sons of the testator's deceased friend, Charles H. Eubanks; 3. That in consequence of these facts, the will embodied a scheme of Amanda and Julia to carry out the same by virtue of the items and provisions in favor of Amanda and her children; that the scheme was inconsistent with law, and contrary to the public policy of the state; and if it did not render the whole paper void as a will, it did so at least as to the items or portions in favor of Amanda and her children, because of its tendency to promote illegal and immoral intercourse between Amanda and her alleged paramour, the said Eubanks, such intercourse being destructive and subversive of the welfare and interests of society.

The items of the will bearing upon these questions are the following:—

"Item 4th. I give, bequeath, and devise to Julian H. Dickson and Charles G. Dickson, minor children of Amanda A. Dickson, and the natural sons of my deceased friend, Charles H. Eubanks, and to the survivor of them, in case either should die leaving no child or children, or representatives, or representatives of a deceased child or children, the two tracts of land in Hancock County [describing], adjoining the land of Baxter, the Alexander place now occupied by said children and others, containing in all five hundred acres, more or less. I appoint Amanda A. Dickson, mother of said children, the testamentary guardian of the property given to her children by this item of my will, and my executors are directed to turn over said property to her as such guardian, to be managed by her for them till they or either of them marry or come of age, at which time, as the case may be, said property may be divided, share and share alike. If both of said children should die before marriage or attaining lawful age, leaving no child or children, or the representative of a deceased child surviving, then the property in this item shall go to Amanda A. Dickson, their mother."

"Item 7th. I give, bequeath, and devise all the rest and residue of my estate not expressly disposed of by this will otherwise, as well all I now own as all I may hereafter accumulate

up to the time of my decease, including lands, live-stock, farming implements, crops on hand and crops growing, railroad stock, bonds, notes, accounts, and everything else of value I may own at my death, to Amanda A. Dickson of Hancock County, now living with her mother near my plantation, for and during her natural life, free, clear, and exempt from the marital rights, power, control, or custody of any husband she may have, with full power to her, the said Amanda A. Dickson, without the aid or interposition of any court, to sell said property and convey the same, and to reinvest the proceeds of said sales in other property, or in good security to be held for her for her life as aforesaid. I charge the property bequeathed by this item of my will with the support and education of the children of the said Amanda A. Dickson, as well those hereafter to be born as those now living; their support to be ample, but not extravagant, their education to be the best that can be procured for them with a proper regard for economy,—all of which I leave to the sound judgment and discretion of the said Amanda A. Dickson, without any interference from any quarter. As either of the children of the said Amanda A. Dickson, born or to be born to her, come of age or marry, I direct her to set off to such child so marrying or coming of age a portion of said property, she to determine in her unlimited discretion what property and how much shall be set off, with only this instruction, that the amount must not be so great as to defeat or imperil my purpose to provide for her during life, and for her children, as well those to be born hereafter as those now in life. Upon the death of the said Amanda A. Dickson, I give, bequeath, and devise what may remain of the property embraced in this item of my will to the children of the said Amanda A. Dickson, and the representatives of any deceased child, share and share alike, such representatives taking *per stirpes*, and not *per capita*."

The ninth item named the propounders as his executors, directed them to prove his will in solemn form, and to turn over to said Amanda all the property given her for life, and requested them to see to it while they live, "that Amanda A. Dickson and her children are protected in their person and their property under the laws, so far as they may be able to do so," and gave each of the executors two thousand five hundred dollars in lieu of commissions.

1. We shall consider, first, whether this will, in the various items mentioned above, and according to its scheme, and the

proof had upon that subject, can be deemed contrary to public policy and void, and whether that question was clearly and properly submitted to the jury under the charge of the court and the testimony in the case. To do so intelligently, it will be necessary to state accurately the several charges of the court upon that subject to which the caveators excepted; and these will be found in the eighteenth, twenty-second, twenty-fourth, twenty-fifth, and twenty-eighth grounds of the motion for new trial, which are as follows:—

“18. The court erred in charging the jury, at request of counsel for the propounders, as follows: ‘There is no public policy in Georgia which prevents colored persons from taking property under a will,’ without more, and without coupling to that the consideration of illicit intercourse which may have produced said will.”

“22. At request of counsel for caveators, the court charged the jury that ‘if Amanda was the bastard child of David Dickson, begotten in this state of a negro slave prior to the late emancipation, he was under no obligation to support or provide for such child prior to such emancipation, except as a slave, if his slave, but then only while she was his slave’; and was requested further in writing to charge: ‘No obligation was upon David Dickson, if he so begot said slave, to support and provide for her after emancipation, or if any such obligation existed, it ceased upon her becoming twenty-one years old’; and the court so charged, leaving out the words, ‘or if any such obligation existed, it ceased upon,’ and inserting ‘and’ after emancipation; and then refused to charge, as requested in writing: ‘If this will was made after such majority, and Amanda was such a bastard of this testator, the parts giving this property to her are void, because contrary to public policy.’ The refusal of this request was error.”

“24. The court erred in refusing to charge, as requested in writing by the counsel for caveators: ‘If the jury believe from the evidence that this will sought to be propounded is contrary to the policy of the state of Georgia, then the jury would be authorized to find against the will.’”

“25. The court erred in refusing to charge as follows: ‘Under the constitution and laws of the state of Georgia, marriages between white persons and negroes are forbidden, and the public policy of the state is against the mingling of the blood of these races, and if you believe this will is against said

policy, it is absolutely void,' though requested in writing by counsel for the caveators."

"28. The court erred in concluding his charge as follows: 'Every man in this state has a right to will his property to whom he pleases. There is no policy of the state which would make it unlawful or contrary to such policy for a man to will his property to a colored person, to any bastard, or to his own bastard, and such considerations as these would not alone authorize a will to be set aside; but you may consider all the facts, relationships, and circumstances in evidence in deciding the questions made before you, which I have already stated and explained to you.' It was error in the conclusion thus to group and state the facts touching the case; thus to use the words 'set aside' in the statement of the absence of a policy as to a testator's bastard without regard to whether he owed any legal obligations to such bastard, and because it did not sufficiently emphasize that matter of illegal cohabitation."

It will be remarked that this will makes no provision for Julia, who, it is alleged, was the concubine of the testator; that there was no pretense of marriage between Eubanks and Amanda; and that there is no direct evidence going to establish the fact that the intercourse between Amanda and Eubanks took place and was carried on in consequence of any previous agreement or promise, on the testator's part, to make provision for Amanda and the children born in consequence of that intercourse. The will was made after that intercourse had ceased, and after the death of Eubanks. It was not seriously insisted that past cohabitation would render a gift by the party holding such a relation to a woman void or illegal; and had it been so contended, the argument could have rested upon no legal principle whatever. Indeed, from a very early period, the law has been well settled to the contrary: *Beall v. Bealls*, 8 Ga. 224; *Hargroves v. Freeman*, 12 Id. 342; *Davis v. Moody*, 15 Id. 175.

A contract to make compensation for the injury done in consequence of past illegal cohabitation, which contained no stipulation for future intercourse, has been held to be valid; and even where such a contract had been fully executed, and the intercourse was kept up afterwards, yet if it did not appear that the subsequent cohabitation was made a stipulation in the contract, it has been maintained; where there was no evidence of any promise or understanding other than that inferred from the fact of future illicit intercourse between the

parties, this did not affect the validity of the transaction. Thus, where a bond had been given in consideration of past cohabitation, without any express stipulation to that effect, or without evidence from which it could be shown that the future cohabitation of the parties was one of its conditions, although in fact they subsequently so cohabitated, it was held that the bond was nevertheless valid, and upon it an action could be maintained: *Chitty on Contracts*, 979; *Trovinger v. McBurney*, 5 Cow. 253; *Gray v. Mathias*, 5 Ves. 286; *Hall v. Palmer*, 3 Hare, 532; *Brown v. Kinsey*, 81 N. C. 245; *Greenhood on Public Policy*, 204-207, and other citations in the notes thereto; *Gay v. Parpart*, 106 U. S. 679.

"The test," says Dillard, J., in delivering the opinion in *Brown v. Kinsey*, *supra*, "always is, Does it appear by the contract itself, or was there any understanding of the parties, though not expressed, that the intercourse was to continue?"

Neither at the testator's death nor when the will was executed could a continuance of the relations between Eubanks and Amanda have been contemplated, for, as before remarked, Eubanks was then dead. There is absolutely nothing in the case to show that the testator, as contended by the caveators, had knowledge of any illicit intercourse between Worthen, one of his executors, and Amanda, subsequent to Eubanks's death. The circumstances in proof warrant no such inference; and nothing beyond vague suspicion or mere conjecture could impute to him knowledge of the fact, or a purpose on his part to make provision with a view to the creation of such a relation between these last-named parties. One thing is certain: that there was no offspring from this intercourse during the life of the testator; nor is there a single fact in proof to charge him with knowledge of it, or to show that he in any way encouraged or promoted it. His will certainly made no provision for the carrying on of such intercourse, or for the maintenance and support of any offspring that might result therefrom. The principal complaint here is, that anything which has a tendency to induce intercourse between persons of the white and negro races is contrary to public policy, and consequently void; and this conclusion is drawn from the prohibition of marriage between these races, as found in our constitution and laws. Illicit intercourse between persons of the same as well as different races is made penal by our code, as also intercourse between persons standing in near relations of consanguinity or affinity to each other, whether that intercourse

take place in consequence of prohibited marriage or otherwise. It is well settled that a white man may be guilty of fornication or adultery with a colored woman, and *vice versa*; and that a white or colored man, if a child is begotten in consequence of such illicit intercourse, may be held liable for bastardy: *Allen v. Harris*, 40 Ga. 220. Indeed, there is no difference in this respect between the rights and liabilities of the different races.

The fourteenth amendment of the constitution of the United States provides, in express terms, that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The supreme court of the United States has decided that this amendment made all colored persons born in the United States, and subject to its jurisdiction, citizens of the United States and of the states in which they reside: *Slaughter-house Cases*, 16 Wall. 90, 95, 97; *Murdock v. City of Memphis*, 20 Id. 615; *Munroe v. Phillips*, 64 Ga. 32.

Under the constitution of Georgia, section 5017 of the code, "all citizens of the United States resident in this state are hereby declared citizens of this state"; and it is made the duty of the general assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such citizenship. And to this effect is section 44 of the code. All distinctions as to the rights pertaining to citizenship between the two races are abolished by this legislation and by these constitutional provisions. As to their civil rights, they stand upon the same footing. It follows, therefore, that whatever rights and privileges belong to a white concubine, or to a bastard white woman and her children, under the laws of Georgia, belong also to a colored woman and her children, and that the rights of each race are controlled and governed by the same enactments or principles of law.

Among the rights of citizens of this state enumerated in section 1654 of the code are the right to the acquisition and enjoyment of private property and the disposition thereof, the right to vote, hold office, etc. It is unquestionably true that

a testator, by his will, may make any disposition of his property not inconsistent with the laws or contrary to the policy of the state: Code, sec. 2399. And this accords with the general law upon this subject. Most persons, in modern times, by that law, are deemed capable of taking under wills, and the exceptions as to those who are incapable of taking are carefully enumerated, and rest generally upon grounds of public policy. Upon these grounds, alien enemies are excluded from benefits under wills; and so are others whose participation in such benefits could, in any sense of the word, be called immoral; if a will makes a devise or bequest to further or carry into effect some illegal purpose, which the law regards as subversive of sound policy and good morals, such devise or bequest will be held void, and the executor would not be justified in paying it. The conditions of a testamentary gift tending to separation or divorce between husband and wife would be treated as void; and to the same general principle of good morals and sound policy may be referred various miscellaneous restraints upon testamentary disposition which local law sees fit to enforce. Thus, under the Louisiana code, a will made in favor of the testator's concubine is treated as null and void: *Gibson v. Dooley*, 32 La. Ann. 959. Doubtless the local conception of public policy on such points is liable, in different jurisdictions and at different times and different epochs, to great variations. Decisions must greatly vary in consequence: Schouler on Wills, secs. 22, 23.

There is nothing in the law of Georgia, that we have seen, inhibiting compensation for past illegal cohabitation being made by a white man to a white woman; and under the law as it now stands, there can be nothing to prevent its being made by such white man to his colored paramour. No arrangement for future cohabitation with a black or white woman would be valid in favor of the woman, or any party deriving a benefit from it. There is nothing in our law prohibiting a putative father from making provision for his illegitimate child, or for the illegitimate offspring of such child. And even conviction of treason or felony, or any lower grade of crime, works no corruption of blood or forfeiture of estate: Bill of Rights, sec. 2, par. 3; Code, sec. 5020. So that a felon or his offspring may take testamentary benefits under the law of this country. No one would contend for a single moment that a contract, agreement, or understanding, founded upon a consideration, in whole or in part, for the commencement or continuance

of meretricious intercourse between the sexes, would not be directly contrary to law or public policy and the best interests of society.

What is public policy? And where must we look to find it? And in ascertaining and applying it to the transactions of life, by what rules and precautions are the courts to be guided? On this latter topic, it is manifest from many decisions that judicial tribunals hold themselves bound to the observance of rules of extreme caution when invoked to declare a transaction void on grounds of public policy; and prejudice to the public interest must clearly appear before a court would be warranted in pronouncing the transaction void on this account.

In *Richmond v. Dubuque etc. R. R. Co.*, 26 Iowa, 190, 202, it is said that "the power of courts to declare a contract void, for being in contravention of sound public policy, is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

After laying down, in terms somewhat different, the same general rule, it was said by Howe, J., of the supreme court of Wisconsin, in pronouncing the judgment of the court in *Kellogg v. Larkin*, 3 Pinn. 123, 56 Am. Dec. 164, 168: "He is the safest magistrate who is more watchful over the rights of the individual than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject than the rights of the state."

So in *Swann v. Swann*, 21 Fed. Rep. 699, recently determined in the United States circuit court for the eastern district of Arkansas, it was said by Caldwell, J., delivering the opinion: "No court ought to refuse its aid to enforce a contract on doubtful or uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of the state, or injurious to the morals of its people. Vague surmises and flippant assertions as to what is the public policy of the state, or what would be shocking to the moral sense of its people, are not to be indulged in."

In the leading case of *Richardson v. Mellish*, 2 Bing. 229, 9 Eng. Com. L. 557, the observance of the rule as thus limited is strongly upheld and rigidly enforced by the whole court. Each of the judges presiding in that case delivered separate opinions, though they all concurred in the result.

Best, C. J., says: "We have heard much of this being a contravention of public policy, and that on that ground it

cannot be supported. I am not much disposed to yield to arguments of public policy. I think the courts of Westminster Hall (speaking with deference, as an humble individual like myself ought to speak of the judgments of those who have gone before me) have gone much further than they were warranted in going in questions of policy; they have taken on themselves, sometimes, to decide doubtful questions of policy, and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy. I therefore say it is not a doubtful matter of policy that will decide this, or that will prevent the party from recovering; if once you bring it to that, the plaintiff is entitled to recover; and let that doubtful question of policy be settled by that high tribunal, namely, the legislature, which has the means of bringing before it all the considerations that bear on the question, and can settle it on its true and broad principles. I admit that if it can be clearly put upon the contravention of public policy, the plaintiff cannot succeed; but it must be unquestionable,—there must be no doubt. Looking at all the facts of this case, I can see no unquestioned principle of policy that stands in the way of the plaintiff to prevent him recovering in this action”; criticising and explaining two cases (*Card v. Hope*, 2 Barn. & C. 661, and *Blachford v. Preston*, 8 Term Rep. 89), which were relied on as opposed to this rule, the learned chief justice admits that in one of the cases there are expressions used by Chief Justice Abbott which seem to bear upon the present case. “But,” he says, “the expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look at in all cases. The manner in which he is arguing is not the thing; it is the principle he is deciding. If ever I could have imagined it could have been extended to such a case as this, I would have protested against, though I could not have prevented, the decision. I would in my place have protested against it, for I should have seen the injustice and confusion to which such a doctrine would have been liable to be extended. I am quite satisfied that not one of the learned judges who decided that case ever conceived that its authority could be pressed to the extent to which it has been pressed in this case.”

His colleague, Park, J., refers to those cases for the principles they determine, and not for their facts. He concurs, as far as necessary, in the respective judgments rendered in them, and says: "The judgment given by my Lord Chief Justice Abbott was very elaborate; but though I concur with the judgment in that case, I am by no means prepared to agree with every *dictum* in that judgment. I am quite satisfied that the reference to general policy in that case by my Lord Chief Justice Abbott was going further than was absolutely necessary, and I think there is nothing here to show illegality."

Sir James Burrough, the other judge, said: "The next point is, that it is illegal. I am of opinion that on the face of this count there is no illegality. If it be illegal, it must be illegal either on the ground that it is against public policy or against some particular law. I for one protest, as my lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail." Further on in his opinion he says: "As to the point of public policy, a great deal has been said, many cases have been mentioned, and in *Blachford v. Preston* a great number of general phrases were made use of by the learned judge. But you ought not to govern courts of justice by general expressions used in the administration of the law. They may have some weight, but they ought not to govern; you must look to what the point of decision was."

In *Walsh v. Fussell*, 6 Bing. 169, 19 Eng. Com. L. 83, Lord Chief Justice Tindal, in pronouncing judgment, said: "It is not contended that the covenant was illegal on the ground of the breach of any direct rule of law, or the direct violation of any statute; and we think to hold it to be void on the ground of its impolicy or inconvenience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public."

In order to ascertain whether the provisions of Girard's will — because they excluded ecclesiastics, missionaries, and ministers of any sect from holding or exercising any station or duty in the college thereby founded, and limited the instructions to be given to the student to pure morality and general benevolence and the love of truth, sobriety, and industry, thus excluding by implication all instruction in the Christian religion — were in contravention of the public policy

of the state, the supreme court of the United States held that they were not at liberty to travel out of the record to ascertain what were the private religious opinions of the testator, nor to consider whether the scheme of education by him prescribed was such as they themselves should approve, or as was best adapted to accomplish the great aims and ends of education; nor could they look to the general consideration of the supposed interest and policy of the state of Pennsylvania on the subject, beyond what its constitution and laws and judicial decisions made known to them. Consequently they held that the question as to what is the public policy of the state, and what is contrary to it, if inquired into beyond these limits, would be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of the judicial duty and functions, and upon which men may and will "complexionally differ." They therefore disclaimed any right to enter upon such examinations beyond what the state constitution, laws, and decisions necessarily brought before them: *Vidal v. Girard's Ex'rs*, 2 How. 127, 197 et seq.

Such was the view taken by Starnes, J., and Benning, J., in *Adams v. Bass*, 18 Ga. 144 et seq., and 154 et seq., as to what constitutes public policy, and the sources from which the rules on that subject are to be derived.

We cannot think that the judge erred in refusing to charge the jury that if they believed from the evidence that the will sought to be propounded was contrary to the policy of the state of Georgia, then they would be authorized to find against it. As to what constitutes public policy, and as to what contravenes it, is not a question of fact for the jury, but is a question of law to be determined by the court. Any other rule than this would lead to confusion and injustice, and instead of settling, would go far to unsettle the law upon this subject.

In *Pierce v. Randolph*, 12 Tex. 290, Chief Justice Hemphill, as the organ of the court, says: "But it seems that a new rule has been discovered by which to test the validity of contracts, and that is, the belief of the jury with regard to their tendency to immorality and breaches of the peace; and this even where such contracts have been declared by the courts of last resort to be valid in law, and to have all the force and efficacy which the law can impart to any contract. No doctrine more subversive of law and of private and public rights could have been

devised. In fact, it sets them afloat upon public sentiment, to fluctuate and rise and fall with the ebb and flow of popular opinion, and when brought to trial, to succeed or fail, not according to the established rules of law, but upon the belief, the private opinions, or in other words, the whims and caprices, of the juries before whom they were presented. The most sacred rights, those most cherished by the law, might be frustrated and defeated without any regard to law; a justice of the peace with his jury might deem them against morals, good order, or public policy." And after giving some striking instances of the dangerous tendency of such a practice, he continues: "It is the duty of both judges and juries to decide on rights according to the laws of the land, and not on their belief as to what ought to be law. Their office is not legislative: it is judicial; it is to administer the law as they find it, and not to exalt their own belief or notions above the law, and follow them as a higher code by which the rights of the community are to be regulated and controlled."

Tried by these rules, we cannot say that Dickson's will is unquestionably and beyond a doubt against public policy. We know of no constitutional provision or statute or any decision of our courts, nor are we aware of any principle of the common law, which holds it to be immoral or wrong for the putative father to make provision for his illegitimate child, whether that child be white or colored; or for the illegitimate offspring of such child, whatever the complexion of such offspring may be; or for any one who has lived in violation of the public law, and thereby become a criminal, either to a greater or less extent, unless that provision is the result of a previous understanding that led to the commission of the offense, and induced a breach of the law and sound public policy of the state.

We have seen that such an understanding is not to be lightly inferred from facts and circumstances of doubtful import and meaning, or which may admit of different constructions, one consistent with and the other opposed to unquestioned policy. The legislature has not seen fit to declare that the tendency of such provisions would be promotive of immorality, and would induce the formation and continuance of such illicit cohabitation, and for that reason, to prohibit them, as has been done by the provision cited from the code of Louisiana. Whether such inhibition would be good or bad policy, is not for us to determine. The question is one upon which there has existed,

and still exists, a contrariety of opinion, as will be seen by what was said by Lumpkin, J., in the case of *Beall v. Bealls*, 8 Ga. 224. And this being the case, its solution is entirely beyond the scope and functions of the judicial department of the government. If judges would avoid uncertainty and fluctuations in the administration of the law, and render it uniform and consistent, they should follow the admirable advice given by Lord Chancellor Bacon to a magistrate whom he was about to swear into office: "Look to your books for the law, and not to your brain." Above all, they should not give themselves up to the guidance and direction of their feelings and sentiments, for this would unquestionably lead to excessive irregularity, fluctuations, and doubt. They would then realize that the fame which follows is better than that which goes before, and would avoid the supreme folly of mistaking the plaudits and shouts of the multitude of their contemporaries for the trumpet of fame. Loyalty to the law, and rigid adherence to the rules it prescribes, is to the enlightened magistrate the plain path of duty, and in pursuing it he can fall into no error, nor run into any kind of danger.

2. The next material question for consideration is based upon the ground that the will was procured by the fraud of Julia and Amanda in inducing David Dickson to believe that Amanda was his child, when she was not, and that her sons were the sons of Eubanks, when they were not. Among other instructions to the jury, the following appear in the general charge of the court: "If the testator was not deceived or misled in any way by the statements or conduct of another or others, then the paper should not be set aside for fraud."

Again: "It is alleged that Amanda and Julia Dickson, or one of them, exercised undue influence over David Dickson's mind, and that they deceived and misled him by making false and fraudulent representations to him concerning the paternity of Amanda and of her children, and thereby procured and induced him to make and execute this paper as his will. It is incumbent on the caveators to make these allegations appear by testimony before you would be authorized to say that they are true. If the allegations as to the conduct of Amanda and Julia, which I have mentioned to you, have been established to your satisfaction by credible testimony, either circumstantial or direct, you should act upon the same under the rules given you in charge."

At the request of the caveators, this charge was given: "If

the will, or parts of the same, be the result of fraudulent practices upon either the fears or affections or sympathies of testator, then it, or the parts so produced, should be pronounced void. You are the sole judges of whether any such fraudulent practices have been shown by the evidence, or are fairly inferable therefrom. The court intimates no opinion on that subject."

"A will procured by misrepresentations or fraud of any kind, to the injury of the heirs at law, is void.

"If the jury believe from the evidence that the legacy to Amanda Dickson and her children in this will constitutes part of one testamentary scheme, and that all the other legacies were intended to be parts of that one testamentary scheme, and if the jury further believe that the said legacy was procured by fraud, misrepresentation, or undue influence exercised by Julia or Amanda, or both, then the jury would be authorized to find against the validity of the whole will.

"If the jury believe from the evidence that David Dickson made this will under the impression that Amanda was his natural child, and if they believe that the will, or so much thereof as relates to Amanda and her children, was induced solely by that belief, if they further believe from the evidence that Amanda was not his child, then they would be authorized to set aside and declare void so much of said will as relates to said Amanda and her children."

The court also charged, at the request of the propounders: "Fraud is never is never presumed: it must be proved, either by facts or circumstances. Before the will can be set aside for misrepresentations, it must appear that the misrepresentations were made, proved to be false, made in bad faith, for the purpose of procuring the will."

To the latter portion of this charge various errors are assigned, and are set forth in the fourteenth ground of the motion for new trial, as follows: 1. It was error to so speak of setting aside the will, or of a subsisting will, when the question was whether the paper propounded was a legal will; 2. It was error to say such representations, if false, must be made in bad faith if made to procure the will, and in saying that if false and in bad faith, they must have been for the purpose of procuring that will; 3. If in bad faith and false, they did procure the will; the purpose of the misrepresentations was immaterial; and it ignored the ground of mistake of fact in this *caveat*, as applied to which it was error.

Our analysis of this charge is, that the paper propounded as a will cannot be set aside for alleged misrepresentations, unless it appear from the evidence that such representations were proved to be false; that they were made in bad faith, and for the purpose of procuring the paper propounded as a will. Standing alone, the latter clause in this charge would, we think, be error, and subject to the criticism made upon it. The issue actually presented was, that the representations were false, with whatever view or purpose they may have been made; and if they had the effect of procuring the will, whether they were made with that object or not, it would be quite immaterial, if they were false and they had the effect of procuring the paper propounded as a will; whether made for that purpose or not, the will should have been set aside; but taken in connection with other parts of the charge, especially those portions hereinbefore set out, we are unable to conclude that the charge contravened or modified this view, or that the language of the court admits of such restricted signification as has been attributed to it.

We think it altogether probable that the jury could not have been misled or confused by the use of the terms employed, and induced to believe that the said representations must have been made with the design to procure the will. Indeed, they were expressly charged, at the request of caveators' counsel, "if they believed from the evidence that David Dickson made this will under the impression that Amanda was his natural child, and if that will, or so much thereof as relates to Amanda and her children, was induced solely by that belief, and they further believe from the evidence that Amanda was not his child, then they would be authorized to set aside and declare void so much of said will as relates to Amanda and her children." This and other charges given would seem to render the exception to the portion of the charge in question nugatory and groundless. Besides, there is no allegation in this motion for new trial that the finding of the jury upon this point was contrary to evidence. All objections to the verdict on this ground seem to have been waived; and had they not been so waived, we are satisfied, from the overwhelming preponderance of the testimony, that Amanda was the natural child of David Dickson, and he could not have acted under any mistake as to that fact in the execution of his will; there is hardly a suspicion raised in the proof that Amanda's children were not the sons of Eu-

banks. So this ground of the motion does not appear, as a whole, or as to its separate parts, to rest upon any solid foundation. It is barely possible, though not at all probable, that Amanda may have been the child of another than David Dickson. There is scarcely a possibility that her children could have had any father other than Eubanks.

3. The remaining ground of the motion for new trial to be considered is as to the influence exerted over David Dickson by Amanda or her mother, and which induced him to make this will. Apart from the representations as to the paternity of Amanda and that of her children, we are unable to ascertain that any effort was made by either of these parties or others to exert any influence over the testator, nor is it made clear that he was subject to such influence, or that his will was so weak and his purpose so infirm as to justify the belief that either could have been controlled or overcome in that manner.

4. As to the remaining grounds of the motion for new trial, we feel satisfied that they are destitute of any such merit as would authorize us in interposing to set aside this will. Indeed, we cannot say that there was error, either in selecting the jury from the panel of the grand jury, or in drawing and summoning that panel, or in the reception or rejection of testimony, etc., or in the assignments of error to the various charges as given or refused of which complaint was made, or in the rules laid down for judging of the credibility of certain witnesses who testified in the case, or lastly, in refusing to hold Turner and Middlebrooks, two of the jurors who tried the case, to be biased or prejudiced. They do not appear to have been operated on by outside and improper influences, and for that reason to have been incompetent and disqualified to sit as jurymen.

From aught that appears to the contrary, the trial was fair, and under our view of the law, would not probably result differently upon another hearing. We repeat that we are satisfied that if any error existed at all in the various rulings and charges of the court, it was immaterial.

Judgment affirmed.

CONTRACTS ARE PRESUMED TO BE FAIR, and not unlawful, or against public policy: *Giddings v. Steele*, 28 Tex. 733; 91 Am. Dec. 336.

ILLICIT COHABITATION AS CONSIDERATION FOR CONTRACT: See the note to *Ayer v. Wilson*, 12 Am. Dec. 676, 677.

MISREPRESENTATIONS NOT PRODUCING DIRECT EFFECT of influencing bequest to party will not vitiate will: *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150.

McNAUGHT v. ANDERSON.

[78 GEORGIA, 499.]

PROPERTY PAID FOR BY WIFE'S EARNINGS, WHEN NOT LIABLE FOR HUSBAND'S DEBTS. — If a husband consent that his wife may take boarders into the family, and agree that she shall have the gross proceeds for application on a contract made by him with a third person for the purchase of real estate, and if the money so acquired by her be thus applied, the money is hers, and not his, her right to it being founded on a meritorious consideration; and if, on completing the payment, she take a conveyance of such real estate to herself, her title will prevail against a creditor of her husband who gave credit after the property was paid for, although the conveyance be of later date than the giving of such credit, it not appearing that the credit was given upon the faith of the specific property, or that the debtor was in possession as apparent owner when the debt was created.

CLAIM. A *fiery facias* in favor of McNaught and Scrutchin against Langford and Anderson was levied on certain real estate, and Anderson's wife interposed her claim. The evidence on her part tended to show that the land in controversy was bought from one Walker, the claimant's husband conducting the negotiations, and taking a bond for a deed in his own name. At the time of the purchase, it was agreed between them that when the payment was made the deed should be made to her. Her husband consented that she should keep boarders, and agreed that she should have the money arising therefrom. He did not assist her in paying for the property. She paid for the property as she had money, and the deed was made to her, dated January, 1884. The note of the defendants upon which the judgment under which the execution issued was dated April 12, 1883. The jury found for the claimant.

Samuel Barnett, Jr., for the plaintiff in error.

Candler, Thomson, and Candler, for the defendant.

BLECKLEY, C. J. 1. The legal unity of husband and wife has, in Georgia, for most purposes, been dissolved, and a legal duality established. A wife is a wife, and not a husband, as she was formerly. Legislative chemistry has analyzed the conjugal unit, and it is no longer treated as an element, but as a compound. A husband can make a gift to his own wife, although she lives in the house with him and attends to her household duties, as easily as he can make a present to his neighbor's wife. This puts her on an equality with other ladies, and looks like progress. Under the new order of things, when he induces her to enter into the business of keeping

boarders, and promises to let her have all the proceeds, he is allowed to keep his promise if she keeps the boarders. It would seem that the law ought to tolerate him in being faithful to his word in such a matter, even though he has pledged it only to his wife; and we think it does. If a husband consent that his wife may take boarders into the family, and that she shall have the gross proceeds for application on a contract which he has made with a third person for the purchase of real estate, and if money so acquired by the wife be thus applied, the money is hers, and not his, her right to it being founded on a meritorious consideration; and if, on completing payment, the wife take a conveyance of the premises to herself from such third person, her title will prevail against a creditor of her husband who gave credit after the property was paid for, though the conveyance to her be of later date than the giving of such credit, it not appearing that the credit was given upon the faith of the specific property, or that the debtor was in possession as apparent owner when the debt was created.

2. The above ruling controls the case upon its substantial merits, and if any errors were committed upon the trial, they were of minor importance, and not material to the result.

Judgment affirmed.

HUSBAND MAY CONSENT THAT HIS WIFE'S EARNINGS shall belong to herself: *McLenore v. Pinkston*, 31 Ala. 266; 68 Am. Dec. 167; though it has been held that a husband cannot give her earnings to his wife as against his creditors: *Cramer v. Reford*, 17 N. J. Eq. 367; 90 Am. Dec. 594.

BOGCESS v. LOWREY.

[78 GEORGIA, 539.]

SUFFICIENT DESCRIPTION OF LAND NOT VITIATED BY ERRONEOUS ADDITION. — Where land is correctly described in a levy by metes and bounds, and by mentioning the adjacent and surrounding landed proprietors, but in giving the number of the district a mistake is made, the sheriff will not be enjoined from executing the process on that ground, the land being capable of ready identification notwithstanding such mistake.

BILL in equity. The injunction asked was refused. The opinion states the case.

Austin and Merrell, Cobb and Merrell, Cobb and Juhan, and R. L. Richards, for the plaintiff in error.

Gordon and Brown, for the defendants.

HALL, J. This was an application made to enjoin the proceedings under a levy and sale, where a portion of the lot of land in controversy was described, not only by number and district, but by metes and bounds, and by mentioning the adjacent and surrounding landed proprietors. It was shown that there was a mistake as to the district where the land lay, and that was the only mistake in the levy or attachment. The number was right, the portion of the lot from which it was taken was right, and the boundaries were also correctly set forth, and the court held that that was an error or misdescription which did not avoid the levy, and that notwithstanding its existence, the land might be readily identified; and for these reasons he would not enjoin the sheriff from proceeding to execute the process. This case falls directly within the principle of *Rogers v. Rogers*, 78 Ga. 688; and also *Harris v. Hull*, 70 Id. 831. *Falsa demonstratio non nocet*.

Judgment affirmed.

DESCRIPTION WHICH MAY BE RENDERED CERTAIN IS SUFFICIENT: *Nixon v. Porter*, 34 Miss. 697; 69 Am. Dec. 408; *Pursley v. Hayes*, 22 Iowa, 11; 92 Am. Dec. 350. If deed contains any description whatever, it is good in so far as it goes: *Nelson v. Brodhack*, 44 Mo. 596; 100 Am. Dec. 328.

RICKS v. BROYLES.

[78 GEORGIA, 610.]

RECEIVER, WHEN LIABLE FOR LOSS OF MONEY IN HIS CUSTODY. — When money is in the hands of a receiver at the place of final custody, and he has no further duty in respect to it except to preserve it, it is already in court, and he cannot part with his custody of it by depositing it in bank, save at his own risk, without some order, leave, or direction authorizing him so to do.

COURT OF EQUITY IN GEORGIA HAS NO OFFICIAL BANKER, and no bank but its receiver.

GENERAL DEPOSIT OF MONEY IN BANK BY RECEIVER IN LOAN, and transforms the fund into a chose in action.

RULE against Broyles, as receiver, requiring him to report to the court the amount in his hands, and to show cause why he should not pay to Ricks the amount due on two mortgage *feri facias* held by him. The receiver answered that he had deposited the money which he had received in the bank of John H. James, in his name as receiver, making the deposit separate from his individual account; that the bank was, at the time he made the deposit, generally regarded as good, sol-

vent, and safe, and he so regarded it, and acted in good faith and according to his best judgment; that the deposit was made to await the result of a contest between certain claimants, or until the court should order the fund to be paid to the creditors; that, on the failure of the bank, he effected a compromise therewith, which he prayed to have the court affirm, and discharge him from all further liability. The court decided that the receiver was not liable for the money lost, as he had acted in good faith, and rendered judgment accordingly. Other facts are stated in the opinion.

A. M. Speer, for the plaintiff in error.

E. N. Broyles, in *propria persona*, *Abbott and Smith, Hoke Smith, and Haygood and Martin*, for the defendants.

BLECKLEY, C. J. 1. When money awaiting the result of litigation is in the possession of a receiver at the place of permanent custody, and he has no further duty in respect to it but that of preservation, it is already in court, the receiver being the hand of the court to hold it, and he cannot pay it out or part with his actual custody of it by depositing it in bank, or otherwise, save at his own risk, without some order, leave, or direction authorizing him so to dispose of it. He is for the court that appointed him as much a final custodian as is the Bank of England for the court of chancery. His poundage or commissions are compensation for his risk, which is that of an official bailee for reward; and while he may not be bound for more than ordinary diligence, his diligence is to be exercised in keeping the money, not in putting it out on deposit, either general or special. A general deposit in bank is a loan, and that the loan was made in good faith, and entered to his credit in bank as receiver, will not avail him. Though without any moral fault, or any legal fault but that of parting with the money, he is liable to make good the loss resulting from his banker's insolvency.

2. The case of *Morgan v. Hardee*, 71 Ga. 738, is no adjudication by this court that a receiver has a right to substitute the good credit of a banker for his own responsibility as ultimate custodian. To rule, as that case does, that there was no such material error of law as to require a new trial, is not to rule that there was no error of law committed by the court below, but rather that under the special facts it was unnecessary to probe the alleged errors to the bottom. *Morgan v.*

Hardee, supra, is not to be extended beyond its own facts; it is no interpretation of any general principle or rule of law. *Philips v. Lamar*, 27 Ga. 228, 73 Am. Dec. 731, settles nothing as to receivers, but only as to sheriffs, receivers being spoken of merely *arguendo* by the judge delivering the opinion.

3. High on Receivers, Kerr on Receivers, Lewin on Trusts, Perry on Trusts, Story on Bailments and on Agency, as cited in the argument, may be conceded to apply in Georgia as elsewhere to receivers, until the fund reaches its final form, and there is no duty left but to hold it for the court at the place of final custody. Then it is in court. The court in Georgia has no official banker, and no bank but the receiver himself. He is its Bank of England, and the Bank of England would not be excused by depositing with John H. James, were his house in London instead of Atlanta. While the fund is passing down the brooks and rivers, it may flow along the usual channels of general business, but when it reaches the ocean it must stop, unless the court orders a reflux current. There is no beyond. The code contemplates that a receiver, who merely has possession and holds, shall hold subject to the direction of the court: Sec. 3149. And the discretion of all trustees in the use of money is, by section 2330 of the code, considerably narrowed: *Brown v. Wright*, 39 Ga. 96. To invest even in state bonds, a receiver must have orders: Code, sec. 275.

4. The moment the deposit was made, the credit of the banker was substituted for the money. Though in loose speech it would be said that this was done for safe-keeping, in literal truth it was done, not to keep the money at all, but to part with it on the banker's credit,—to make it cease to be the money of the receiver and become the money of the banker, with the expectation of drawing from him on demand at a future time other money to take its place in the coffers of the court. It was a loan by the receiver to the banker, made under the name and with all the incidents of a general deposit. The fund was transformed into a chose in action. A receiver, whose duty is one of mere custody and not the transaction of business, cannot at his own will lay the foundation of an action or render an action necessary. He cannot even sue or defend without leave: *Field v. Jones*, 11 Ga. 417.

5. While the case is ruled on broad grounds, and is meant to stand on general principles, it is right to call attention to one aspect of the special facts. The banker was already the receiver's personal banker, and continued to be so, with the re-

sult that when insolvency occurred, the receiver was indebted to him by note, and had also overdrawn his personal account. It is a fair inference that whilst the receiver, as such, was lending to his banker, the latter was lending to him as an individual. There was no mixture of accounts, no mixture of funds, on the books, but there was probably no attempt to prevent mixture of money in the vault, or when used by the banker in his general business, including that with the receiver on his note and overdrafts. Though no such thing was premeditated or designed, it is and must remain uncertain whether some of the money put into the bank as receiver did not come back to the receiver as an individual on his drafts, or as consideration for his note. With a court-fund large enough, a considerable banking business might go on prosperously in this way for an indefinite time. Indeed, it is but a question of amount and length of loan without interest as to whether banks, patronized by chancery through receivers, would not outstrip all rival institutions, at least in disposition, if not in ability, to accommodate the receivers. A court of errors must take judicial notice of human nature.

Judgment reversed.

POSSESSION OF RECEIVER IS POSSESSION OF THE COURT, and receiver holds funds subject to the order of the court: *Henry v. Kaufman*, 24 Md. 1; 37 Am. Dec. 591; *Morrill v. Noyes*, 56 Me. 453; 96 Am. Dec. 436.

BANKER AND GENERAL DEPOSITOR SUSTAIN RELATION OF DEBTOR AND CREDITOR: *Gumbel v. Abrams*, 20 La. Ann. 568; 96 Am. Dec. 426.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

LYON v. BALLENTINE.

[68 MICHIGAN, 97.]

CHATTEL MORTGAGE GIVEN TO SEVERAL persons jointly may be made to cover separate debts, and either mortgagee may enforce his claim by foreclosure, or the mortgagees may foreclose jointly.

IF CHATTEL MORTGAGE, BY MISTAKE OR WANT OF KNOWLEDGE, is given for more or less than the actual indebtedness, and no deception or fraud is practiced by either party, it will not have the effect of invalidating the mortgage.

CHATTEL MORTGAGE TAKEN SUBJECT TO A PRIOR ONE properly made and executed is valid.

CHATTEL MORTGAGE. — BREACH OF ANY OF THE CONDITIONS of a chattel mortgage entitles the mortgagee to take possession and foreclose.

CHATTEL MORTGAGE SPECIFYING NO TIME OF PAYMENT is due without demand, and can be foreclosed immediately.

FORECLOSURE OF CHATTEL MORTGAGE — GARNISHMENT. — When chattels are in the hands of a sheriff for the foreclosure of two mortgages against them, held by three different partnerships, and a writ of garnishment is then served on the mortgagees, they cannot be held as garnishees, when none of them has ever been in joint possession of any of such chattels, and none of them is indebted to the mortgagor, and none of them has any property for which they are jointly or severally liable to him.

GARNISHMENT IS A STATUTORY PROCEEDING based upon contract relations, or upon equities growing out of or created by such relations. The form of the action under which the proceedings may be prosecuted against defendants has little or nothing to do with the true character and relation existing between the parties. The garnishee defendants cannot be held for property of the principal defendants in their possession as for a wrong, unless their possession was wrongful as between them and the principal defendants at the time the writ was served, no matter in what form of action the statute may authorize the proceeding to be prosecuted, or the declaration permitted may indicate.

ALL THE PARTNERS HAVE RIGHT TO BE HEARD before a court when it is sought to deprive them of their property on a charge of fraud, actual or constructive, arising out of their contract relations with others, and any proceeding which does not accord to them this right in court is illegal.

A. McDonell, for the plaintiffs.

Simonson, Gillett, and Courtwright, and Holmes and Collins, for the defendants and appellants.

SHERWOOD, J. From the record in this case it appears that for some time prior to 1880, the principal defendant, Marontate, was in the employ of Silas L. Ballentine & Co., at Port Huron, the defendant, Ballentine, being a member of that firm; that in that year Marontate engaged in general merchandise business at Bay City, commencing with a capital of his own, not exceeding one thousand dollars, and that his first purchases of goods to stock his store were made, beyond his capital, of Ballentine & Co., on credit. He continued his business, and largely increased the same, a part of the time occupying two stores, until December, 1884; during all of which time Ballentine & Co. continued to be his creditors, and he also became largely indebted to others, among whom were W. D. Robinson & Co., James K. Burnham & Co., Edson, Moore, & Co., and the plaintiffs in this case, the indebtedness to the latter being, at the date last mentioned, about the sum of \$6,857.32.

It further appears that on the fourth day of December, 1884, Marontate's entire liabilities were fully equal to and perhaps greater than the value of his entire stock of goods, it aggregating between thirty-five thousand and forty thousand dollars; that at this time Marontate executed a chattel mortgage for twelve thousand dollars to Ballentine & Co. on his stock of goods, to secure them, and placed the same on file in the proper office. He then telegraphed Ballentine & Co. what he had done, and Ballentine came to Bay City and received a duplicate of the mortgage.

J. K. Burnham & Co., on being advised the same day of the existence of the mortgage, through the commercial agency, at once sent their agent to Marontate, and he asked for a mortgage to secure the Burnham debt; this being refused by Marontate unless the agent would allow the Robinson & Co. claim to be included. Those terms were accepted, and a mortgage executed to James K. Burnham & Co. and to W. D. Robinson & Co., covering the entire stock of goods, to secure both debts, amounting to the sum of \$9,775.19, and duly filed.

On the next day Marontate executed a third mortgage upon the same goods to Edson, Moore, & Co., and the plaintiffs, to secure their debts, and on the same day Ballentine placed in the hands of the sheriff of Bay County Ballentine & Co.'s mortgage for foreclosure, under the power contained therein. At the same time Burnham placed in the hands of the sheriff the Burnham & Co. mortgage, with instructions to foreclose the same for the mortgagees therein named, and the property was advertised for sale on both mortgages, at the same place, on the 13th of December, at 11 A. M. on the first, and at 9 A. M. on the second.

The goods were sold under the Burnham and Robinson mortgage, subject to Ballentine & Co.'s mortgage, which was stated to be \$11,207, and Day, Campbell, & Co., of Detroit, become the purchasers at such sale, at the sum of \$3,100.

On the morning of the day of the sale of the property, and before it took place, the writ of garnishment in this case was served on defendants Ballentine and Burnham.

The affidavit upon which the writ was issued was made by John C. McLaughlin, agent of the plaintiffs, and charges that Silas L. Ballentine and James K. Burnham had "property, money, goods, chattels, and effects in their hands and under their control belonging to the principal defendant, Marontate," as he believed, and had good reason to believe.

The garnishee defendants filed their separate disclosures in writing, and were separately examined under the statute. At the instance of the plaintiffs, a statutory issue was framed for trial of the matter between the plaintiffs and garnishee defendants, and a trial thereof was had before Judge Green, by jury, in the Bay circuit, which resulted in a verdict for the plaintiffs for the full amount of the judgment recovered in the plaintiffs' suit against the principal defendant, being \$6,857.32.

The garnishee defendants remove the case into this court by writ of error for review.

The record is full, and has been examined with care; but we do not think this judgment can be sustained.

An actual *bona fide* indebtedness from Marontate to James K. Burnham & Co. and to W. D. Robinson & Co. is not disputed or questioned, nor that it was intended to cover the amount owing to both firms in the mortgage they received. It is not claimed that this mortgage was defective in form, or in its execution.

That a chattel mortgage given to several persons jointly

may be made to cover separate debts is settled in this state in *Adams v. Niemann*, 46 Mich. 135; and that either mortgagee may enforce his own claim by foreclosure of the mortgage must, I think, be conceded on authority: *Herman on Chattel Mortgages*, 357; *Burnett v. Pratt*, 22 Pick. 556; *Gilson v. Gilson*, 2 Allen, 115; and such mortgage may be foreclosed by the mortgagees jointly: *Wheeler v. Nichols*, 32 Me. 238; *Howard v. Chase*, 104 Mass. 249.

If the mortgage, by mistake or want of knowledge at the time, has been given for more or less than the actual indebtedness, and no deception or fraud was intended by either party, it will not have the effect to invalidate the mortgage: *Jones on Chattel Mortgages*, sec. 92; *Willison v. Desenberg*, 41 Mich. 156; *Wood v. Scott*, 55 Iowa, 114; *Kalk v. Fielding*, 50 Wis. 339; *Strauss v. Kranert*, 56 Ill. 254; *Blakeslee v. Roseman*, 43 Wis. 116, 123.

The prior mortgage given to Ballentine & Co. seems to have been properly made and executed, and it was competent for the second mortgagees to take theirs subject to the Ballentine mortgage; and such was the fact, as shown by the record: *Jones on Chattel Mortgages*, sec. 492; *Smith v. Smith*, 24 Me. 555; *Shoenberger v. Mount*, 1 Handy, 566; *Treat v. Gilmore*, 49 Me. 34; *Tuite v. Stevens*, 98 Mass. 305; *Newman v. Tymeson*, 13 Wis. 172; 80 Am. Dec. 735.

The mortgages taken by J. K. Burnham & Co. and W. D. Robinson & Co., and by Ballentine & Co., were both duly filed as soon as made, and were in the usual form, authorizing possession to be taken of the property by the mortgagees, and sale thereof to be made, as soon as condition broken.

A breach in any one of the conditions entitled such possession to be taken and foreclosure of the mortgage to be made by the mortgagee: *Leland v. Colver*, 34 Mich. 418; *Cassel v. Cassel*, 26 Ind. 90; *Jones on Chattel Mortgages*, sec. 760.

These mortgages specified no time of payment, and were therefore due without demand of payment, and could be foreclosed immediately: *Eaton v. Truesdail*, 40 Mich. 1; *Jones on Chattel Mortgages*, sec. 770; *Dikeman v. Puckhafer*, 1 Abb. Pr., N. S., 32; *Howland v. Willett*, 3 Sand. 607; *Farrell v. Bean*, 10 Md. 217.

The mortgage given to Ballentine & Co. contained no illegal provision. It was in the usual form, and properly executed. It was due by its terms, and the testimony shows it was unpaid. There was nothing on its face showing anything

more than the ordinary security given upon personal property to secure *bona fide* indebtedness of the mortgagor, and the same may be said of the Burnham mortgage.

Under these circumstances, Ballentine & Co. placed their mortgage in the hands of the sheriff of Bay County for foreclosure, and he seized the goods therein described by virtue thereof; and Burnham & Co. and Robinson & Co. placed their mortgage also in the hands of the same sheriff, with instructions to foreclose the same for them; and it was while the property was in this situation that the garnishee writ was served upon these defendants.

The property had never been in the actual possession of either of the defendants, but was in possession of the sheriff at the time the writ was served, and had never been removed from Marontate's store.

The defendants had no interest whatever in the goods, except as members of their respective firms. The indebtedness for which the mortgages were given belonged to three different firms, the claim for each being for different amounts, and neither firm having any connection whatever with the others.

It is not claimed or pretended that either of these three firms mentioned in these two mortgages owed Marontate anything when the writ in this case was served, nor that either or all or any two of the firms had any joint actual possession of the property, nor that the garnishee defendants held any property for which they were jointly liable to Marontate, the principal defendant. This being so, the case falls clearly within the decisions of this court that in such cases the garnishees cannot be held. There was no joint indebtedness from Marontate to the defendants Burnham and Ballentine in regard to which they were acting at the time. The proceeding cannot, under such facts, avail anything for the plaintiffs: *Ball v. Young*, 52 Mich. 476; *Ford v. Detroit Dry Dock Co.*, 50 Id. 358.

Really, there was no joint possession of the property taken in this case. The possession was taken by Ballentine & Co., and while thus being held it was sold under the Burnham mortgage, subject to Ballentine & Co.'s interest.

These garnishee defendants could not be proceeded against jointly under the statute. Garnishee proceedings are authorized by statute alone, based upon contract relations, or upon equities growing out of or created by such relations. The form of the action adopted by the statute under which the

garnishee proceedings may be prosecuted against defendants has little or nothing to do with the true character and relation existing between the parties. The garnishee defendants cannot be held for property of the principal defendant in their possession as for a wrong, unless their possession was wrongful as between them and the principal defendant at the time the writ was served, no matter in what form of action the statute may authorize the proceeding to be prosecuted, or the declaration permitted may indicate. The legislature cannot make that a wrong which the constitution says shall not be.

It is true that under this statute the legislature has authorized the court in this proceeding, where it is properly commenced and the proper parties are before the court, to determine whether, under the provisions of the act, the garnishees' holding of the property shall not be held void as against the plaintiffs in the principal suit, even though it may be in good faith and valid between the garnishee defendants and the defendant in the principal suit; and to the extent that this may be done, the proceeding must be governed by equitable principles, and it never can be done in this proceeding, or any other, until all persons, whether natural or artificial, who have substantial interests in the property have been in some manner properly brought before the court.

Partners have all a right to be heard before a court, when it is sought to deprive them of their property on a charge of fraud, actual or constructive, arising out of their contract relations with others; and any proceeding which does not accord to them this right in a court of justice is illegal, and cannot be sustained.

In no view that I have taken of this case can I discover any ground upon which the judgment can be supported. If the suit had been properly brought, and all the necessary parties had been before the court, I am unable to see how the garnishees could be held. Fraud alone seems to have been relied upon, and I am not satisfied that the testimony offered and received upon that point was sufficient to authorize the court to submit the case to the jury. Other errors are assigned, but the view taken of the case renders it unnecessary to pass upon them now.

The judgment should be reversed.

AT COMMON LAW, CHATTEL MORTGAGE VESTED PROPERTY ABSOLUTELY IN MORTGAGEE upon breach of condition, and no process of foreclosure was necessary: *Taber v. Hamlin*, 97 Mass. 489; 93 Am. Dec. 113.

VALIDITY OF GARNISHMENT PROCEEDINGS DEPENDS UPON THE STATE OF FACTS existing at the time of service of the writ: *Hancock v. Collyer*, 119 Mass. 187; 96 Am. Dec. 630.

CHATTEL MORTGAGEE CANNOT BE CHARGED AS GARNISHEE by mortgagor's creditors, in respect to property included in the mortgage, but the possession of which remains in the mortgagor: *Fountain v. Smith*, 70 Iowa, 282.

IN ACTIONS ON PARTNERSHIP CONTRACTS, ALL PARTNERS OUGHT TO BE MADE DEFENDANTS; See *Smith v. Cook*, 31 Md. 174; 100 Am. Dec. 58.

CHATTEL MORTGAGEE, RIGHTS OF, when condition in mortgage is broken: *Charter v. Stevens*, 3 Denio, 33; 45 Am. Dec. 444, and note 447; *Tannahill v. Tuttle*, 3 Mich. 104; 61 Am. Dec. 480, and note.

GARNISHEE IS NOT LIABLE unless it appears that he had property, credits, or effects in his possession belonging to defendant in attachment, or was indebted to him: *Well v. Tyler*, 38 Mo. 545; 90 Am. Dec. 441; *Mims v. West*, 33 Ga. 18; 95 Am. Dec. 379.

LOVE v. FRANCOIS.

[63 MICHIGAN, 181.]

APPEAL BY PERSON ACTING IN TWO CAPACITIES. — Where a person is interpleaded both as administrator and as an heir at law, the filing of claim of appeal and the execution of an appeal bond stating an appeal in his individual capacity will not perfect the appeal as to him in his representative capacity, though he subsequently files notice with the proper officer that he appeals in both capacities, and that his appeal bond has been filed.

GIFT INTER VIVOS is consummated by delivery of the thing given, either actual or constructive; but it is not necessary that delivery be made to the donee in person. It may be made to some person for him, or to a trustee for that purpose, but in such cases the disposition in favor of the donee must be such as will place the *jus disponendi* beyond the power of the donor to recall.

GIFT FROM FATHER TO CHILD. — Less positive and unequivocal proof is required to establish the delivery of a gift from father to child than as between persons not related; and in cases where there is no suggestion of fraud or undue influence, very slight evidence will suffice.

GIFT INTER VIVOS, WHAT CONSTITUTES. — Where a father, wishing to reserve to himself the income arising from his land during his life, and give the avails thereof to his heirs, deeds the land to his son and takes the latter's note, secured by mortgage, as payment, payable four years after the father's death, to his legal heirs, the interest during his life payable to him, he thereby creates a gift *inter vivos*, completed as to delivery, as far as consistent with his own rights in the paper, by making the heirs the payees of the note, and by recording the mortgage; and though he retained actual possession of the note for his security as to the interest, still he constituted himself trustee for the heirs in the custody of the note by implication of law, and they alone could enforce payment.

Such gift is completed as to acceptance, as to the grantee, by his assigning his interest therein before his father's death, at the happening of which event the proceeds of the note go to the heirs, and not to the administrator.

ACCEPTANCE OF GIFT NEED NOT BE MADE IMMEDIATELY; it is sufficient if accepted before revoked by death or otherwise.

RES JUDICATA — JUDGMENT OF FORECLOSURE NOT AN ESTOPPEL AS TO HEIRS. — Where a father conveys land to his son, and takes a note secured by mortgage for the purchase-money, payable to his legal heirs four years after his death, interest thereon payable to himself during his life, and afterwards brings suit to foreclose for non-payment of such interest, making the grantee sole defendant, obtaining a decree for the interest due, and for the sale of the land if such interest is not paid, after which it is paid without sale, such proceeding is not *res judicata*, nor does it work an estoppel as against the heirs, in an action between them and their father's administrator for the recovery of the money due on the note, as the proper parties litigant as to its ownership never were before the court, and their co-heir could not, by silence or inaction, admit away their rights.

BILL to redeem from a mortgage. Decree for complainant.

Edwards and Stewart, and P. C. Beard and George P. Hopkins, for the appellants.

Dallas Boudeman, for the respondent.

CHAMPLIN, J. On April 28, 1866, Cyrus K. Francis was the owner in fee of forty-nine acres of land situated in the township of Texas, Kalamazoo County, Michigan. He had four children living at that time; namely, Theodore and Charlemagne Francis, Harriet Bell, and Elizabeth Barrett. Another of his daughters had died, leaving two children who were then living, named Byron H. Fox and Estella Brown. These persons were his heirs at law at the time of his death, which occurred on the eighteenth day of March, 1880.

On the said twenty-eighth day of April, 1866, Cyrus K. Francis conveyed by deed to his son Charlemagne Francis the forty-nine acres of land. The consideration expressed in the deed, although nothing was paid down, was two thousand dollars. Upon the receipt of this conveyance, Charlemagne Francis made and delivered to his father, Cyrus K., his promissory note as follows: —

“KALAMAZOO, April 28, 1866.

“For value received, I promise to pay to the legal heirs of Cyrus K. Francis, four years after his death, sixteen hundred dollars, with seven per cent interest per annum, and payable annually to the said Cyrus K. Francis during his natural lifetime; at his death the interest to cease. The payment of this

note is secured by mortgage on real estate, of even date herewith, and stamped with revenue stamp of two dollars.

"CHARLEMAGNE FRANCIS."

To secure the payment of this note on the same day, Charlemagne made, executed, and delivered to Cyrus K. Francis a mortgage covering the same lands conveyed to him by his father, in which it is stated that the mortgage was made to secure a part of the purchase-money for the premises therein described. The mortgage contains the usual power of sale in case of default. Cyrus K. Francis caused this mortgage to be recorded on the twenty-eighth day of April, 1866, but retained possession of the note until his death.

Charlemagne Francis went into possession of the property conveyed to him, and thereafter paid to Cyrus K. Francis the annual interest as it matured upon the note for the years 1867, 1868, and 1869. For the three years following, Charlemagne neglected to pay the interest. In July, 1872, there was due for unpaid interest \$336, and Cyrus K. Francis commenced a suit in the circuit court for the county of Kalamazoo, in chancery, to foreclose the mortgage. In this suit Cyrus K. Francis was the sole complainant, and Charlemagne was the sole defendant. Personal service of subpoena to appear and answer was had, and a decree for a foreclosure by sale was duly entered for the interest due. The bill of complaint filed in the cause, in addition to the clauses usually contained in such bills filed to obtain a foreclosure where the whole indebtedness is not due, contained the following statements:—

"And your orator further shows that he was the owner of said real estate above described, and being aged and infirm, he desired to dispose of his said real estate in such a manner as might secure to himself a comfortable support, and at the same time he had it in view to declare and direct the disposition of the avails of his said real estate after his death; and accordingly, to effectuate such purpose, he sold and conveyed to said Charlemagne Francis, his son, his said real estate above described, and received from said Charlemagne Francis the note and mortgage hereinbefore mentioned and described; and said note and mortgage were given for the said purchase-money of the said described real estate, your orator stipulating for the payment of the interest, as mentioned in said note and mortgage, during his life, as his means of support.

"And he further shows that he is the absolute owner of the

entire mortgage interest mentioned and described in said mortgage, no consideration having passed to him, from any persons whomsoever, on account whereof or whereby he provided for the payment of said purchase-money to his heirs."

Proof was introduced in support of these statements in the bill. Cyrus K. Francis testified:—

"The amount of principal and interest unpaid on this note and mortgage, marked 'Exhibit A,' is mine; it belongs to me. I have never delivered to any person the note and mortgage. I own the same myself, and provided for its payment in this manner with the view to make, at my own time, distribution of my own property.

"Am acquainted with these mortgaged premises; I went onto them in 1855, and staid there till within a few years past, and until about four years ago.

"At the date of this mortgage, marked 'Exhibit A,' I conveyed these mortgaged premises to the defendant Charlemagne Francis, and the mortgage in question I received from the defendant to secure the payment of the whole purchase-money upon that sale. I received no consideration for the provision making the payment of the principal of sixteen hundred dollars payable to my heirs."

The decree was entered March 6, 1873, and authorized a sale of the mortgaged premises if the amount reported due was not paid by July 15, 1873.

On June 14, 1873, Charlemagne Francis sold and assigned his interest, which he then had as heir at law of Cyrus K. Francis, to the sum of sixteen hundred dollars, payable to the heirs of Cyrus K. Francis, and secured by said mortgage, to the complainant, and on the 16th of June, 1873, said Charlemagne sold and conveyed the mortgaged premises to the complainant. This conveyance was subject to the mortgage above referred to, and was conditioned that complainant should pay the mortgage as so much purchase-money for the premises. Complainant has paid the amount found due by the decree, and has paid all interest on the note up to the time of the death of Cyrus K. Francis. Upon the death of Cyrus, Theodore Francis was appointed administrator of his estate.

Commissioners on claims were appointed, and a claim was presented and allowed in favor of Theodore Francis for \$1,745.72, and no appeal was taken from such allowance.

In February, 1885, the complainant filed his bill of complaint, setting forth, substantially, most of the facts above

narrated, and alleging that the defendant Theodore claimed that the moneys secured by the note and mortgage belonged to the estate of Cyrus K. Francis, and should be paid to him as the administrator thereof; that the other defendants claimed that said moneys belonged to the heirs of the said Cyrus, and should be paid to them without passing through the hands of the administrator; asserts that he is, and has always been, willing to pay said heirs or administrator, or both, said sixteen hundred dollars, except the share thereof assigned to himself by Charlemagne; prays that defendants may interplead, and settle between themselves to whom the money belongs, and asks leave to redeem the premises from said mortgage, and to pay the redemption money into court, and that the mortgage may be discharged.

Defendants Theodore Francis, Harriet Bell, and Elizabeth Barrett answer, admitting the facts alleged in the bill, except that they say that the making of said conveyance by Cyrus K. Francis to Charlemagne, and taking the note and mortgage from him in the manner provided, was in pursuance of the purpose then entertained by Cyrus K. Francis in his lifetime to distribute the avails of this real estate after his death.

They also set up the foreclosure proceedings, and insist that the decree in that suit established the fact that said Cyrus K. Francis was the owner of said note and mortgage, and upon that question is *res judicata*, and that said indebtedness was the estate of said Cyrus at the time of his death.

They also aver the allowance of the claim in favor of Theodore, and that whatever interest the heirs of Cyrus K. have in said sixteen hundred dollars is an interest in the residue only after payment of the debt of the estate to said Theodore, and that it is the duty of complainant to pay said mortgage debt to said administrator; and defendants Harriet and Elizabeth deny that they set up any claim to said debt, and insist that such money is payable to the administrator, and not to the heirs of said Cyrus K.

The defendants Byron H. Fox and Estella Brown answered separately, and admit the facts charged in the bill of complaint, and claim that they are entitled, as two of the heirs at law of Cyrus K. Francis, to the same share of the avails of said note that their deceased mother would have been entitled to if living.

The cause was heard in the court below upon proofs taken in open court, and a decree was rendered therein on the six-

teenth day of January, A. D. 1886, that the said sum of sixteen hundred dollars now belongs to the persons who were the children and grandchildren of Cyrus K. Francis at the date of the mortgage, or their legal representatives in case of the death of any, and that complainant by assignment from Charlemagne Francis, stands in his place and stead, and succeeds to his share of said sum of sixteen hundred dollars and interest; that complainant be allowed to redeem by paying into the hands of the register of the court on or before three months the said sum of sixteen hundred dollars and interest, and that thereupon said mortgage be discharged.

The decree also declares who were the heirs at law to whom such money should be paid, and that one fifth thereof be paid to each, namely, the complainant, Theodore Francis, Harriet Bell, and Elizabeth Barrett, and one tenth thereof to Byron H. Fox and Estella Brown each, and that complainant's costs should be paid out of the fund of sixteen hundred dollars before distribution thereof under the decree.

It was further decreed that Theodore Francis, as administrator of the estate of Cyrus K. Francis, deceased, had no interest whatever in said mortgage debt. From this decree Theodore Francis, on the tenth day of February, 1886, filed his claim of appeal, and executed the proper bond.

On the twenty-fifth day of February, 1886, Theodore Francis, by his solicitors, gave notice that he had appealed as administrator, and personally, and that the appeal bond was filed on the 10th of February. This notice appears to have been filed with the register. It is printed in the record. The case was not settled until the 5th of April, 1886; and where proofs are taken in open court, the party has forty days from the settlement of the case in which to appeal, provided forty or more days have elapsed since the entry of the decree: *Gale v. Gould*, 40 Mich. 62.

The notice given and filed as above stated may be considered as a written claim of appeal, and made in time, of Theodore Francis, as administrator; but he, as such administrator, took no steps to perfect such appeal. The decree entered below disposed of his rights as administrator, and established certain rights in him to the fund as heir of Cyrus K. Francis.

The law is explicit that the party appealing shall file with the register, within said forty days, a bond to the appellee, with certain prescribed conditions. The bond filed on the 10th of February, 1886, was the individual bond of Theodore

Francis, and it recited that Theodore Francis had appealed to the supreme court from the decree of the circuit court of Kalamazoo County, in chancery, made on the 18th of January, in which Charles M. Love is complainant, and Theodore Francis, Harriet Bell, Elizabeth Barrett, Byron H. Fox, and Estella Brown are defendants.

The bond does not purport to cover the right of the administrator to appeal. At that time he had not claimed an appeal. If the bond had been given in his own behalf, and that of himself as administrator, it would have been sufficient: *Warner v. Whittaker*, 5 Mich. 241; but such was not the case, and no appeal has been perfected in the case of the administrator of the estate of Cyrus K. Francis, deceased.

It is not to be regretted, however, as our investigation into the merits of the whole controversy leads us to the conclusion that the decree below is correct, and should be affirmed.

Cyrus K. Francis, in his lifetime, being the owner of forty-nine acres of land, wished to reserve to himself the income arising therefrom during his life, and to give the avails thereof to his heirs. One object was to prevent the distribution thereof through the ordinary channel of the probate court, and to make distribution thereof by his own hand during his life. To accomplish this object, he converted the land into personality by conveying the same to Charlemagne Francis, and taking from him a promissory note for sixteen hundred dollars, payable to the heirs of Cyrus four years after the decease of himself. Interest at seven per cent per annum was to be paid to Cyrus, but was to cease upon his death.

The payment of the principal and interest according to the note was secured by a mortgage upon the property sold, which Cyrus placed of record.

The only question is, whether the disposition thus made of the sixteen hundred dollars constituted a valid gift *inter vivos* to the heirs. That such was the intention there can be no doubt from the transaction itself.

To constitute a valid gift *inter vivos*, there must be a delivery of the thing given, either actual or constructive. It is not necessary that it be delivered to the person intended directly. It may be delivered to some person for him, or to a trustee for that purpose, and in all cases such a disposition of it must be made in favor of the donee as effectuates the object and places the *jus disponendi* beyond the power of the donor to recall.

Under some circumstances the donor himself may constitute himself trustee of the thing for the benefit of the donee: *Ellis v. Secor*, 31 Mich. 185; 18 Am. Rep. 178; *Green v. Langdon*, 28 Mich. 221.

Such was the case here. The donor retained an interest in the avails of the fund given, by way of the interest payable thereon during his life. This interest of the donor made it necessary, in the form he saw fit to adopt to carry out his purpose, to retain the actual possession of the note for his own security, but the same instrument evidenced the gift to his heirs as the designated object of his bounty. He had placed the mortgage of record, and had done all he could do to make a delivery consistent with his own rights in the paper, and was, by the transaction, a trustee for the heirs in the custody of the instrument by implication of law.

It requires less positive and unequivocal testimony to establish the delivery of a gift from a father to his children than it does between persons who are not related, and in cases where there is no suggestion of fraud or undue influence very slight evidence will suffice. In this case there were several donees. A manual delivery could not be made of the instrument to all; but a constructive delivery was effected by making them the payees of the note, and recording the mortgage by which it was secured. By directing the note to be made payable to his heirs, he placed the title in them at once, and it was unimportant in whose possession or custody the paper might remain. Whoever might hold such possession would do so in trust for them, and they alone could enforce payment.

In *Wyble v. McPheters*, 52 Ind. 393, where A delivered several United States bonds to B, with directions for the latter to give the same to certain of his children at his death, B received them, and agreed to execute the trust. It was held that this was a sufficient delivery to constitute a gift *inter vivos*, and that, upon the death of A, an action would lie against B in favor of the children of A to compel him to execute the trust, and also against the administrator of A, to whom B had delivered the bonds.

Where H. had loaned to his adopted son large sums of money, and taken his notes, which he afterwards indorsed to his adopted son, but retained possession until the Civil War, when he delivered them, with other notes, to the son to conceal, which he did in the house of the holder, where they re-

mained until after the death of H., it was held that the notes were an irrevocable gift to the adopted son: *Trowell v. Carraway*, 10 Heisk. 104.

In *Richardson v. Lowry*, 67 Mo. 411, it was held that a note taken by the husband on a sale of his property, payable to his wife, was *prima facie* evidence of a gift to her.

In *Malone's Estate*, 13 Phila. 313, it was held any act on the part of the owner of a chose in action, showing not only a present intention to transfer, but that he regarded himself as having carried his intention into effect, is sufficient without written evidence of the transaction, and that there is no difference between gifts *causa mortis* and gifts *inter vivos*. See also, as bearing upon the question, *Barker v. Frye*, 75 Me. 29; *Fletcher v. Fletcher*, 55 Vt. 325; *Eastman v. Woronoco Savings Bank*, 136 Mass. 208; *Scott v. Berkshire Co. Savings Bank*, 140 Id. 157; *Basket v. Hassell*, 107 U. S. 602.

Under these circumstances, there was a constructive delivery of the note and mortgage, and all the delivery that could have been made in the nature of the case. The disposition he had made of the sixteen hundred dollars was effectual to place the amount beyond his control or power of recall, and passed at once to the donees intended. The payees named in the note, namely, "the heirs of Cyrus K. Francis," must be understood as his "legal heirs," in the popular sense of that term. He referred, by that expression, to a class of persons then in being, who bore that relation to him which would constitute them legal heirs at his death, should it occur at that time. These, under our statute, are the children living at the time of the death of the ancestor, and issue of any deceased child.

In this cause, it is stipulated that, on the twenty-eighth day of April, 1866, the following persons were the children and grandchildren: The children's names were Charlemange, Theodore, Elizabeth, and Harriet, and the grandchildren were Estella Brown and Byron H. Fox, daughter and son of a deceased daughter; and that these were his only children and grandchildren at the time of his death.

The acceptance of a gift need not be made immediately. It is sufficient that it be accepted before revoked by death or otherwise. The fact that Charlemange sold and assigned his interest in the sum payable to the heirs to the complainant seven years or more before the death of said Cyrus is evidence of acceptance, and the gift being to him jointly with the

other heirs, such acceptance, being beneficial, inures to their benefit.

It is set up in the joint and several answer of Theodore, Elizabeth, and Harriet that Cyrus K. Francis was indebted to defendant Theodore, at the time of the death of Cyrus, in the sum of \$1,745.72, and that such sum has been allowed to him by commissioners on claims appointed by the probate court. The answer is silent as to when such indebtedness accrued, and no claim is made or urged by defendants that the gift made by Cyrus K. Francis was in fraud of his creditors or of the defendants.

It is also claimed by these defendants that the note, and indebtedness it represented, and mortgage securing the same, having passed into a decree in the foreclosure suit which adjudged Cyrus K. Francis the owner, that question is *res judicata*, and said mortgage indebtedness so decreed was his when he died. We do not think that the decree in that case was *res judicata*. The object of the bill was to foreclose for non-payment of interest. Cyrus K. could not foreclose for non-payment of the principal. It was not due, and never would become due in his lifetime. The proper parties to litigate the ownership of the principal sum were not before the court, and Charlemagne, by his silence or inaction, could not admit away their rights. Besides, the decree was for payment, and was fully performed, and no rights can be predicated upon it.

Charlemagne put in no answer to the foreclosure bill setting up or suggesting that the principal sum secured by the mortgage was a gift *inter vivos* to the heirs, and the complainant did not set up in his bill that there was any pretense of such claim made by the defendant or other persons, and denying the truth of such claim. The case, therefore, lacked both identity of subject-matter and identity of parties to make it *res judicata* of the present case.

The subject-matter of a litigation is the right which one party claims as against the other, and on which he demands the judgment of the court. The subject-matter or right claimed by Cyrus K. Francis in the foreclosure suit against Charlemagne Francis was the annual interest due and owing to Cyrus K., and the right to enforce the mortgage security to satisfy the sum due, and to become due, to Cyrus K. for interest on the mortgage. That question is not involved in this suit. What was said by Cyrus K. Francis in his bill and

testimony as to his ownership of the principal of the note, and his intention in making the disposition of his property six years previously, were not admissible to affect the rights of the donees: *Scott v. Berkshire Co. Savings Bank*, 140 Mass. 166.

If the gift took effect at all, it took effect when the papers were executed and the mortgage was recorded. Charlemagne was one of the donees, and his acceptance of the gift is implied in his undertaking to pay the principal to the heirs, a fifth thereof being payable to himself.

It is claimed that the complainant is not in a position to file a bill of interpleader. The primary object of the bill is to redeem from the mortgage, and, as connected therewith, to ascertain to whom the money is payable, and, by payment, to obtain a discharge of the mortgage. To this end the bill partakes of the character of an interpleader, and was properly filed.

The relief granted by the court below is consistent with the views above expressed, and the decree appealed from will be affirmed, with costs.

CAMPBELL, C. J. I concur with my brother Champlin in the disposition of this case. But, in my opinion, it was competent for the decedent to make the residuary money payable in any manner and to any persons he might choose by the terms of the contract, and it in no way concerned the party contracted with for what reasons the provisions were made, so long as the contract was based on a valid consideration between the parties. Under such circumstances, a payment to the beneficiaries was the only one that would satisfy the contract, unless it was changed by the contracting parties, and this was not done. The beneficiaries had a right to proceed in equity as the real parties in interest; and the administrator, if he sued at law to enforce the contract, could only do it for failure to pay the beneficiaries, and not for the estate's benefit.

GIFT OF PERSONAL PROPERTY, MADE WITH INTENT TO TAKE EFFECT IMMEDIATELY and irrevocably, and executed by complete and unconditional delivery, is binding upon the donor as a gift *inter vivos*: *Henschel v. Maurer*, 69 Wis. 576; 2 Am. St. Rep. 757; and see cases cited in note for essentials of valid gift *inter vivos*. A gift from father to son, to be valid, must be accompanied by actual delivery: *Medlock v. Powell*, 96 N. C. 499.

IN GEORGIA, GIFT IS PRESUMED TO HAVE BEEN ACCEPTED, unless contrary is shown: *Larendon's Succession*, 39 La. Ann. 952; and see *Wall v. Wall*, 30 Miss. 91; 64 Am. Dec. 147.

DELIVERY OF DEED CONSUMMATES GIFT, on the principle of estoppel: *Connor v. Trawick's Adm'r*, 37 Ala. 289; 79 Am. Dec. 58, note 62.

GIFT, DELIVERY NECESSARY TO CONSTITUTE: *Hall v. Howard*, Rice, 310; 33 Am. Dec. 115; *Hillebrand v. Brewer*, 6 Tex. 45; 55 Am. Dec. 757, and note 761; *Stephenson v. King*, 81 Ky. 425; 50 Am. Rep. 178.

GIFT FROM PARENT TO CHILD, evidence necessary to establish: *Poorman v. Kilgore*, 26 Pa. St. 365; 67 Am. Dec. 425.

JUDGMENT DOES NOT CONCLUDE ONE not a party thereto: *Short v. Galwey*, 83 Ky. 501; 4 Am. St. Rep. 168, and note 173. And in foreclosure proceedings, the decree does not bind an interested third party who is not made a party to such proceedings: *Bates v. Ruddick*, 2 Iowa, 423; 65 Am. Dec. 744.

GIBBONS v. FARWELL.

[63 MICHIGAN, 344.]

TROVER AND CONVERSION — WRONGFUL DELIVERY BY CARRIER. — Where defendant undertook to carry by water and deliver to plaintiff certain property belonging to the latter, but after the carriage was completed made no attempt to so deliver the property, but allowed the master of the vessel, who was his servant, and assumed to be a deputy United States marshal, to deliver the property, without the consent of the owner, to a third party, the act of so delivering the property to a third person is a tortious one on the part of defendant, and a wrongful conversion, for which trover will lie.

INTENT WITH WHICH WRONGFUL ACT is done, by which a party is deprived of his property, except when malicious, is of little consequence if the act is done. It is the effect of the act which constitutes the conversion.

WHERE CARRIER OF GOODS allows an officer to take the goods he is carrying, it is no defense against an action of trover for their value to show that the officer took them without also showing that he had a legal right to take them by virtue of his writ.

WHERE CARRIER HAS ALLOWED AN OFFICER to take goods he is carrying, and in an action of trover seeks to show a better right to the property or to its control than the plaintiff's, the legal proceedings upon which the officer's writ or order is based should be introduced.

TROVER. Judgment for defendant.

Atkinson and Atkinson, and Alfred Russell, for the plaintiffs and appellants.

Moore and Canfield, for the defendant.

SHERWOOD, J. This is an action of trover to recover the value of seven thousand hop-poles, a part of the cargo of the barge Southampton, and was once before in this court: See 58 Mich. 233.

It appears from the record now before us, that in 1880 John McKay was getting out hop-poles at Schneaux Islands, in

Lake Huron, and that he made an arrangement with the firm of Johnstone and Gibbons, of which the plaintiff is survivor, by which they were to furnish the necessary money and provisions to carry on the work. McKay was to get out the timber and poles, and ship them to Johnstone and Gibbons, at Detroit, who were to be the owners of the property; and when sold by them, McKay was to be paid for his services whatever sum was received for the poles over and above money advanced and goods furnished by Johnstone and Gibbons to pay for them.

The defendant was the owner of a steamboat, run by Captain Rose at this time, and the plaintiff and his partner made an engagement with the owner to carry a load of goods to the islands, and bring back the property in question to Detroit.

The captain, while at the islands, took on board the poles in question, and other property, as furnished by McKay, to carry them to Detroit.

The following is the bill of lading given at the time they were shipped by the master:—

“CHEBOYGAN, MICHIGAN, September 4, 1880.

“Shipped, in good order and well conditioned, by John McKay, agent, for account and at the risk of whom it may concern, on board the barge Southampton, whereof H. Rose is master, bound for Detroit, the following articles, as herein marked and described, to be delivered in like good order and condition, as addressed in the margin, or to his or their assigns or consignees, upon paying the freight and charges as entitled by law, dangers of navigation excepted.

“In witness whereof, the master or clerk of said vessel has affirmed to — bills of lading, of this tenor and date, one of which being accomplished, the others to stand void.”

The consignment is to Johnstone and Gibbons, Detroit, Michigan. Under the head of “Articles” is written, “250 cords cedar posts; 7,000 hop-poles, cedar.” Then follow the words “more or less.” Under the head of “Lake Freight” is written, “\$3 pr. cord on posts,” and the bill is signed, “Capt. H. Rose.”

It appears from the testimony of McKay that he got out the poles for Johnstone and Gibbons, and that he acted as their agent in the transaction after the poles were placed on board the boat Southampton. The plaintiff and his partner were notified of the shipment by Mr. Farwell. The barge was taken in tow by a propeller, and after the cargo arrived at

Detroit, the poles were delivered by the master (while, as he claims, he was acting as deputy United States marshal) to C. P. Taylor (and who, as he claims, was another deputy United States marshal). This was done by the master without the consent of the consignees or consignor, and, so far as the record shows, the master never made any attempt to make delivery of any kind of the goods to them, or either of them.

The plaintiff's declaration contains a single count in trover for the value of the poles. The plea is the general issue, with notice that defendant would show the property was taken from the master by legal process, so that delivery to the consignees could not be made. The cause was tried in the superior court of Detroit, before a jury, and the verdict was directed by the court for the defendant; the court holding that, under the facts stated in the record, trover would not lie. The plaintiff brings error.

We are not able to agree with the learned judge of the superior court in his decision in this case. In giving his directions to the jury he said: "In order to establish a case for recovery in trover, there must be shown a wrongful act, and an intentional conversion by the defendant. . . . In an action of trover, the defense is complete when the plaintiff shows, in making his case, that the property was taken from the defendant without the consent of the defendant. . . . The first principle is, that the act of the defendant must be shown to be voluntary and intentional. Further than that, the evidence shows the title to have been in another person than the plaintiff, and, under the testimony, the plaintiff cannot recover."

Before a verdict can be properly directed by the court for the defendant, all the testimony in favor of the plaintiff bearing upon the issues given by him and his witnesses, and all making a case for him given on the part of the defendant, if accepted as true, must fail to make out a *prima facie* case, after the most favorable construction that can be possibly given to such testimony for the plaintiff.

Under this rule, what does the testimony show in this case? That the plaintiff and his partner were the owners of the poles in question at the Schneckau Islands, in Lake Huron, and had an agent there getting them out, and looking after them, and attending to their shipment. The defendant undertook to carry by water, and deliver to plaintiff and his partner, seven thousand poles at Detroit. Defendant carried the poles, but

when he arrived at Detroit, made no attempt to deliver them to the plaintiff and his partner; but when the boat arrived, the master, who was the servant of the defendant, and assumed to be a deputy United States marshal, delivered the property, without the consent of the owners, to a third party.

Can there be any question, under such a state of facts, but that the defendant, in allowing the master (who must be considered as his servant) to make such disposition of the plaintiff's property, converted it? We think not.

The act of thus delivering the property to a third person was a tortious one, and especially so if it is true, as claimed by the defendant, that the person to whom it was delivered denied the right of the plaintiff and his partner to control the property, and intended to contest their title thereto.

We think that, upon reason and authority, the act of the defendant's servant in wrongfully delivering the property to a person not entitled thereto must be regarded as the act of the defendant, and one of conversion: Cooley on Torts, 441, 448, 534; Edwards on Bailments, sec. 162; 3 Cooley's Bla. Com. 152; notes; Angell on Carriers, sec. 324; *Syeds v. Hay*, 4 Term Rep. 260; *Keyworth v. Hill*, 3 Barn. & Ald. 685; *Fisher v. Kyle*, 27 Mich. 454; *Bullard v. Young*, 3 Stew. 46; *Ind. etc. R. R. Co. v. Herndon*, 81 Ill. 143; *Illinois Cent. R. R. Co. v. Parks*, 54 Id. 294; *Esmay v. Fanning*, 5 How. Pr. 228; *Coykendall v. Eaton*, 55 Barb. 188; *Bissell v. Starr*, 32 Mich. 298; *Edwards v. Frank*, 40 Id. 616; *Hicks v. Lyle*, 46 Id. 488; *Barnum v. Stone*, 27 Id. 835, 336.

The intention with which the wrongful act is done by which a party is deprived of his property, except when malicious, is of little consequence, provided the act is done. It is the effect of the act which constitutes the conversion: Edwards on Bailments, sec. 162; Cooley on Torts, 534-538, 688; *Griswold v. Haven*, 25 N. Y. 595; 82 Am. Dec. 380.

The defendant was a carrier, and if the carrier of goods allow an officer to take the goods he is carrying, it is no defense against the plaintiff's action of trover for their value to show that an officer took them, unless he shows that he had a legal right to take them by virtue of his writ: Angell on Carriers, sec. 337 a; *Kiff v. Old Colony etc. R'y Co.*, 117 Mass. 591; 19 Am. Rep. 429.

It is claimed that such a showing was made in this case. We think not. The evidence by which it is claimed such showing was made was, as we think, erroneously received,

against the objection thereto by the plaintiff's counsel, and cannot be regarded in this discussion.

There was better evidence of the facts sought to be established, and when the defendant seeks to show a better right to the property or to its control than the plaintiff claims, the legal proceedings upon which the officer's writ or order is based should be introduced: *Beach v. Botsford*, 1 Doug. 199; 40 Am. Dec. 45; *Gidday v. Witherspoon*, 35 Mich. 368.

What we have said sufficiently indicates our views in this case.

The judgment must be reversed, and a new trial granted.

COMMON CARRIER WHO DELIVERS CONTRARY TO BILL OF LADING commits a breach of contract, and is liable for the value of the goods: *Pennsylvania R. R. Co. v. Stern*, 119 Pa. St. 24; 4 Am. St. Rep. 628, and cases in note.

MOTIVE OF CONVERSION IS MATERIAL ONLY TO RESIST RECOVERY OF EXEMPLARY DAMAGES, and is no element of the conversion: *Veltan v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184, and note.

CONVERSION, WHAT NECESSARY TO MAINTAIN TROVER: *Timber v. Morrill*, 20 Vt. 477; 94 Am. Dec. 345, note 349; *Rogers v. Hale*, 1 Cal. 429; 56 Am. Dec. 363, and note; *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 310, and note 319.

FAHEY v. CROTTY.

[63 MICHIGAN, 328.]

JUDGMENT IN TRESPASS AS EVIDENCE. — IN ACTION OF TRESPASS on the case for an assault and battery, to recover damages for an injury received during a controversy concerning the location and erection of a line fence, a former judgment in trespass in favor of defendant in an action brought by plaintiff's father against him for tearing down a portion of such fence is inadmissible in evidence, as such judgment is not conclusive evidence in favor of defendant, either of title to the fence, or to the land inclosed by it. It only determines his non-liability in damages for tearing the fence down, but does not establish his right to rebuild it.

TRESPASS — EVIDENCE OF GOOD CHARACTER INADMISSIBLE. — In an action of trespass for damages for an assault and battery, evidence of the good character of defendant is inadmissible, as his character is not in issue.

EVIDENCE OF CHARACTER OF PARTIES to a cause, or of particular facts not in issue, with a view of raising a presumption in favor of a person, or unfavorable to his adversary, is inadmissible, except where the character of the parties is in issue.

EVIDENCE OF GOOD CHARACTER is usually confined to cases where defendant is charged with having committed a criminal offense.

EVIDENCE OF GOOD CHARACTER to rebut imputations of misconduct or fraud is inadmissible in civil actions, except where by the pleadings the character of the party is put in issue.

AM. ST. REP., VOL. VI. — 20

ACTION of trespass on the case. Judgment for defendant.

Griffin and Warner, for the appellant.

John Atkinson, for the defendant.

CHAMPLIN, J. The declaration in this cause is trespass on the case for assault and battery. The plea was the general issue. The defendant recovered judgment in the court below, and plaintiff brings error.

The plaintiff's father and the defendant owned adjoining lots in the city of Detroit, and a dispute arose over the location of the line fence between them, which resulted in an effort of each of them to build a line fence upon what each considered the line. Plaintiff gave evidence tending to prove that her father was removing dirt from one of the post-holes; that thereupon the defendant struck her father over his head with a piece of scantling, and as he was bending down wiping the blood from his forehead, defendant and one John Kissane picked up a fence-post, and were about to strike her father with the post, at the same time the defendant remarking that he would murder him; and thereupon the plaintiff threw herself between her father and defendant, and pushed the top of the post backwards, and then defendant with Kissane shunted the post against the plaintiff, striking her in the vicinity of the chest.

The defendant gave evidence tending to prove that plaintiff was active in her efforts to prevent the building of the fence upon what he claimed to be the line; that as he was stooping over she attempted to kick his head, and afterwards threw a pail of slop upon him; that her father cut with his shovel the line which he had stretched upon the ground; that he had made a contract with John Kissane to build the fence, and that he had nothing to do with it further than to show where it was to be built. He denied the statements of the plaintiff as to the manner of the alleged injury, and showed that it occurred in the effort of plaintiff and her father to prevent the setting of a post; that Kissane had placed a post in the hole, when plaintiff's father seized it near the ground to pull it out, and plaintiff seized it higher up and lifted, while Kissane attempted to hold it down; that their combined strength proved too much for Kissane, and they pulled the post out, which fell over and hit the plaintiff, without being shunted at all; that the defendant was twenty feet from the post at the time, and had nothing to do with it.

Numerous persons witnessed the transaction, and testified in the cause.

Defendant also offered in evidence the files and records of the cause pending in the circuit court for the county of Wayne, wherein John Fahey, the plaintiff's father, was plaintiff, and the defendant, Crotty, was defendant. The files and records disclosed the fact that in 1878 an action of trespass on the case was brought against the defendant by Fahey for tearing down a portion of the dividing line fence, which the evidence showed had stood there some sixteen or seventeen years. They also showed a verdict and judgment for defendant. These files and records were admitted in evidence against plaintiff's objection as to materiality, and exception was taken.

The court also admitted evidence, against objection and exception of plaintiff's counsel, tending to show that the fence, as finally built by defendant on the day of the alleged assault, was upon the line as it stood at the time Crotty tore it down, in 1873, for which the foregoing suit was brought and tried. Defendant also called eight witnesses, who were permitted to testify, against the objection of plaintiff's counsel, to the good reputation of the defendant as a quiet, peaceable, and orderly citizen in the neighborhood where he resides.

In rebuttal, the plaintiff's evidence tended to show that she did not in any way interfere with the men at work, and that her father did not interfere; that she did not throw any slop upon defendant, and did not kick at him; also that the line as built by defendant was not the line of the fence as the fence stood at the time it was torn down by Crotty, in 1878, and was further over on the premises of her father.

The court instructed the jury that in building the line fence the defendant was not the aggressor; that the record of the suit in the circuit court for the county of Wayne fixed and determined that he was building the fence upon his own line.

The only errors which we consider well assigned relate,—
1. To the admission of the records and files of the circuit court of Wayne County in evidence; 2. The instruction of the court relative to such suit; 3. The admission in evidence of the testimony of the reputation of defendant as to being a peaceable and quiet citizen.

The counsel for defendant contends that the introduction of evidence to show whether the work being done for defendant

was upon his own land, and whether defendant had really done as charged, was important; and that the records and files in the suit between plaintiff's father and defendant were relevant to show these facts, and were the very best evidence, and were binding, not only as between the parties thereto, but as to all others who should attempt to assist Fahey in any matter touching the fence or line in question. He cites us to no authority to support this proposition, and it is opposed to our own decision in *Keyser v. Sutherland*, 59 Mich. 455.

The judgment in the suit of *Fahey v. Crotty* was not conclusive evidence of title in Crotty of the fence, or the land which it had inclosed. It settled nothing but that Crotty was not liable in damages to Fahey for having torn it down. It did not establish his right to rebuild it. The testimony was irrelevant, and its admission, and the charge based thereon, were erroneous.

The testimony of defendant's good reputation in this action was inadmissible. His reputation as a peaceable citizen was not in issue. There is a natural presumption arising in favor of a party in all cases that he is a peaceable, law-abiding citizen, and that such is his reputation among his neighbors. But this reputation, with a few exceptions, is not in issue in ordinary civil actions, either upon contract or in tort. The distinction is between cases where character is in issue and where it is not. The general rule is, that it is not competent to give evidence of the general character of the parties to a cause, nor of particular facts not in issue, with a view of raising a presumption to a party, or unfavorable to his adversary: Best on Evidence, sec. 257; 1 Phillips on Evidence, *757 et seq.

It is only where the very nature of the proceedings is such as to put the character of the parties in issue that a different rule prevails. This is not the case in an action for an assault and battery. However good his reputation may be among his neighbors as a peaceable citizen, it does not tend to prove that he did not commit the assault complained of. Evidence of good character has been usually confined to cases where defendant is charged with having committed a criminal offense. Under the law as it formerly stood, and as it exists in some jurisdictions at this time, the defendant was not a competent witness for himself. Under such circumstances, it was frequently of the utmost importance to the accused that he should be permitted to show his good character, as tending to repel the probability of his having committed the

offense, and to support the presumption of innocence; and in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character has been admitted to repel it.

In civil actions, with the exception of those cases where, by the pleadings, the character of the party is put in issue, the weight of authority is against the admissibility of such testimony to rebut imputations of misconduct or fraud: *Goldsmith v. Picard*, 27 Ala. 142; *Ward v. Herndon*, 5 Port. 382; *People v. Josephs*, 7 Cal. 129; *Boardman v. Woodman*, 47 N. H. 120; *Church v. Drummond*, 7 Ind. 17; *Revill v. Pettit*, 3 Met. (Ky.) 314; *Morris v. Hazelwood*, 1 Bush, 208; *Thayer v. Boyle*, 30 Me. 475; *Gutzwiller v. Lackman*, 23 Mo. 168; *Porter v. Seiler*, 23 Pa. St. 424; 62 Am. Dec. 341; *Frazier v. Pennsylvania R. R. Co.*, 38 Pa. St. 104; 80 Am. Dec. 467; *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. 673, 675, 676; 16 Am. Dec. 460; *Pratt v. Andrews*, 4 N. Y. 493; *Smets v. Plunket*, 1 Strob. 372; *Wright v. McKee*, 37 Vt. 161; *Humphrey v. Humphrey*, 7 Conn. 116, 118, 119; *Ketland v. Bissett*, 1 Wash. C. C. 144; *Thompson v. Church*, 1 Root, 312; *Bruce v. Priest*, 5 Allen, 100; *Anderson's Ex'rs v. Long*, 10 Serg. & R. 55; *Atkinson v. Graham*, 5 Watts, 411; *Field on Damages*, 473, sec. 603; 1 Wharton on Evidence, sec. 47; *Brown v. Evans*, 8 Saw. 488, 494; *Simpson v. Westenberger*, 28 Kan. 756; 42 Am. Rep. 195; *Reddin v. Gates*, 52 Iowa, 210; *Quinton v. Van Tuyl*, 30 Id. 554; 1 Phillips on Evidence, *757, and note 199; *Jones v. Stevens*, 11 Price, 235; *Nash v. Gilkeson*, 5 Serg. & R. 352; *Givens v. Bradley*, 3 Bibb, 195, 196; 6 Am. Dec. 146; *Davenport v. Russell*, 5 Day, 145, 148; *Jeffries v. Harris*, 3 Hawks, 105; *Norton v. Warner*, 9 Conn. 172; *Corning v. Corning*, 6 N. Y. 97; *Houghtaling v. Kilderhouse*, 1 Id. 530.

The case at bar, however, does not come within the principle of those cases where such testimony is held admissible. They hold such testimony admissible only where the evidence showing wrong intention or moral turpitude depends upon circumstantial evidence from which an inference of guilt may be deduced, and in such cases the evidence is admitted to repel the inference. In this case the evidence was not circumstantial, but positive, as detailed by the plaintiff and her witnesses, while the defendant and his witnesses gave positive testimony that he had no hand in the assault and battery at all. There was no reason, therefore, why the testimony was admissible, unless it is so in all cases, without exception.

In *Townsend v. Graves*, 3 Paige, 453, 455, 456, it was said that in no case is it allowable to adduce evidence in support of the party's character until it has been impeached.

In the state of New York, such evidence was at one time received in civil suits (*Ruan v. Perry*, 3 Caines, 120, 123); but that case has been reviewed and overruled in later cases, and the English rule adhered to as stated by the text-writers on evidence: *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. 678; 16 Am. Dec. 460; *Houghtaling v. Kilderhouse*, 1 N. Y. 530.

For the errors pointed out, the judgment must be reversed, and a new trial granted.

EVIDENCE OF CHARACTER IS NOT ADMISSIBLE IN CIVIL ACTIONS, except when the character of one of the parties is in issue: *Porter v. Seiler*, 23 Pa. St. 424; 62 Am. Dec. 341; and see the note to *O'Bryan v. O'Bryan*, 53 Am. Dec. 133.

ESTOPPEL BY JUDGMENT, GENERALLY: See note to *Lea v. Lea*, 96 Am. Dec. 775 et seq.

TO MAKE RECORD OF FORMER TRIAL evidence to conclude any matter in issue between the parties, it must appear therefrom, or by other proof, that the same matter was in issue and decided at the former trial between the same parties: *Cecil v. Cecil*, 19 Md. 72; 81 Am. Dec. 628, note 631; and such record is inadmissible to directly charge a stranger to it: *Pico v. Webster*, 14 Cal. 202; 73 Am. Dec. 647, and note 651; *Smith v. Moore*, 7 S. C. 209; 24 Am. Rep. 497. The remarks of the court in excluding from evidence the judgment record in the previous case of *Fahey v. Crotty* are so brief and vague that we are not sure we understand the grounds of the decision. If the court intended to assert that because there was no evidence to show the matter actually litigated in the prior action it could not be received as evidence in this, the court was unquestionably correct; but if it meant to affirm that a judgment in trespass is not conclusive of a title or right when such title or right is put in evidence under proper pleadings, then it is not supported by the weight of authority: *Freeman on Judgments*, sec. 310; *Warwick v. Underwood*, 8 Head, 238; 75 Am. Dec. 767.

MATTER OF FRAZEE.

[68 MICHIGAN, 396.]

CONSTITUTIONAL LAW. — LEGISLATURE HAS NO POWER to subject the people of cities to the uncontrolled and arbitrary will of a common council, nor deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers.

MUNICIPAL CORPORATIONS. — TO BE VALID FOR ANY PURPOSE, ALL CITY CHARTERS, LAWS, AND REGULATIONS must be capable of construction, and must be construed in conformity to constitutional principles, and in harmony with the general laws; and any by-law which violates any of

the recognised principles of legal and equal rights is necessarily void so far as it does so, and void entirely if it cannot be reasonably applied according to its terms.

MUNICIPAL CORPORATIONS. — **CITY CHARTER** and the power it assumes to grant can only confer such power over the subjects referred to as will enable the city to keep order and suppress mischief, in accordance with the limitations and conditions required by the rights of the people, and no grant of absolute discretion to suppress lawful action altogether can be granted at all. Regulation, and not prohibition, unless under clear authority of the charter, and in cases where it is not oppressive, is the extent of the city power.

CONSTITUTIONAL LAW — PERSONAL LIBERTY. — In all free and most civilized countries, people may assemble to parade together, or to form processions for political, religious, and social demonstrations, by day, or reasonable hours of night, with banners and paraphernalia, and with music of various kinds; and cities can possess no repressive power over these movements, except when they create public disturbances, or operate as nuisances, or create or manifestly threaten some tangible public or private mischief.

CONSTITUTIONAL LAW — SALVATION ARMY. — **RELIGIOUS LIBERTY DOES NOT INCLUDE** the right to introduce and carry out every scheme which persons see fit to claim as part of their religious system, but it is not legal to make any exceptions for or against the "Salvation Army," so called, because of its theories concerning practical work. It has the same right and is subject to the same restrictions, in its public demonstrations, as any secular body which uses similar means for drawing attention or creating interest; and whatever regulation is made regarding it must operate uniformly, under the same conditions, which must be fixed expressly and intelligibly, and not left to the caprice of any one.

MUNICIPAL CORPORATIONS — REGULATION OF SALVATION ARMY PROCESSIONS. — An ordinance providing that "no person or persons, association or organizations, shall march, parade, ride, or drive in or upon or through the public streets of the city, . . . with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without first having obtained the consent of the mayor or common council of such city, . . . funeral and military processions excepted; but such processions, as well as those having the permit or consent of the mayor or common council, when using the public streets of such city, shall conform to such directions as the mayor or chief of police may give in relation to the streets to be used and the portion thereof to be occupied by them, and in relation to the manner of such use," and providing a penalty by fine not exceeding five hundred dollars for conviction of violation of such ordinance, — is unreasonable and void, because it suppresses what is, in general, perfectly lawful, and because it leaves the power of permitting or restraining processions — in this case, a salvation army procession — and their courses to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent legal provisions, operating generally and impartially.

Stone and Hyde, for the petitioner.

J. W. Ransom, for the respondent.

CAMPBELL, C. J. Petitioner was brought up on *habeas corpus* to determine on the legality of his detention under a complaint and warrant in a proceeding before the police court of Grand Rapids. No point is raised concerning the formality or jurisdiction of the court, if the by-law is valid under which the complaint was made. We shall, therefore, not pass upon the form of the remedy, as no argument was made except on the by-law.

The complaint was made under a by-law of the city of Grand Rapids, passed on the 18th of September, 1886, and which, from the petition, appears to have been published on the 24th of the same month. The violation of it is alleged to have occurred on the 28th of September, which seems to have been as soon as it became operative. The by-law in question is entitled "An ordinance to regulate the use of the public streets in the city of Grand Rapids, and to prohibit certain doings therein."

This ordinance consists of five sections, of which the first and fifth are chiefly material in this inquiry.

The first section is as follows: "No person or persons, association or organizations, shall march, parade, ride, or drive in or upon or through the public streets of the city of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor or common council of said city; funeral and military processions, however, shall not be subject to the foregoing provisions of this section; but such processions, as well as those having the permit or consent of the mayor or common council, when using the public streets of said city, shall conform to such directions as the mayor or chief of police may give in relation to the streets to be used, and the portion thereof to be occupied by them, and in relation to the manner of such use."

Then follows a clause that nothing in this ordinance shall affect or impair existing ordinances on nuisances, and the use of streets and sidewalks.

Section 2 prohibits breaking up or interfering with funeral processions. Sections 3 and 4 relate to circulating advertising devices.

Section 5 is as follows: "All persons who shall violate any of the provisions of this ordinance, on conviction thereof, shall be punished by a fine of not exceeding five hundred dollars, and costs of prosecution; and in default of the payment thereof,

shall be imprisoned in the common jail in the county of Kent, or in any penitentiary, jail, or work-house of said city, at hard labor, until the payment of such fine and costs, but for a period not exceeding ninety days."

The nature of this imprisonment seems to correspond with criminal rather than with civil imprisonment; but as this question was not fully argued, it will not be especially noticed on the present hearing, as the other questions raised are decisive.

The petition for the writ of *habeas corpus* sets out that petitioner and his associates are members of an organization known as the "Salvation Army," which had paraded in Grand Rapids during two years or more, and on repeated prosecutions for public nuisance, had been acquitted, and that the ordinance in question had followed quite soon after the last acquittal. Various considerations are set up concerning the rights of such bodies, which do not become very material as the case stands on the record.

On the twenty-ninth day of September, 1886, petitioner and several others were arrested for having violated the ordinance on the previous evening. The charge made was that they "did then and there parade in, upon, and through the public streets of the city of Grand Rapids, to wit, Canal Street and Pearl Street, with musical instruments, banners, and flags, while singing and shouting, without first having obtained the consent of the mayor or common council of the city of Grand Rapids," contrary to the ordinance before named.

Under the warrant petitioner was arrested, and has since been kept in custody, the trial having been postponed to enable this application to be made.

The validity of sections 1 and 5 of the ordinance is disputed on various grounds,—the former as an unreasonable and unlawful interference with the streets, and the latter as unauthorized and oppressive, beyond the power of the city to enforce.

Section 1, as has been seen, while imposing no limits on military and funeral processions, except that it authorizes the mayor or chief of police to confine them to particular streets, gives to those officers unlimited discretion in fixing their route. Other processions cannot move at all, with music and banners, unless authorized by the mayor or council, and when so authorized, are under the same arbitrary direction, as to route, of the mayor or chief. Funeral processions, and no others, are protected from disturbance.

As the common council only sits at intervals, the power of determining whether processions shall be allowed is left practically within the unlimited discretion of the mayor. Some of the questions argued before us concerning the fifth section had some bearing on the constitutionality of portions of the charter as well as by-laws. So far as section 1 is concerned, it is claimed to be outside of any inference or grant of authority in the charter. That point may be first noticed.

There is no express reference in the charter to the use of streets for processions, and no power is given to license or regulate them, in terms. It contains no reference to the streets beyond such as contemplates that they shall be under municipal oversight in the usual ways, some of which are mentioned. Counsel for the city referred to various powers which they claim cover the ordinance in question. These were the powers:—

“1. To prevent vice and immorality; to preserve public peace and good order; to prevent and quell riots, disturbances, and disorderly assemblages;

“2. To prevent the cumbering of streets, sidewalks, etc., in any manner whatever;

“3. To control, prescribe, and regulate the manner in which the highways, streets, avenues, lanes, alleys, public grounds, and spaces within said city shall be used;

“4. To prohibit practices, amusements, and doings in said streets having a tendency to frighten teams and horses, or dangerous to life and property;

“5. To prohibit and prevent any riot, rout, disorderly noise, disturbance, or assemblage in the streets or elsewhere in said city;

“6. To provide for maintaining the peace and good government of said city.”

If the legislature of the state had the power to subject the people of cities to the uncontrolled and arbitrary will of a common council, and, having such power, had clearly signified their purpose to do so, then it might perhaps be claimed, with some show of reason, that the city of Grand Rapids could do what it pleased under these grants of power. But the rules of legal construction allow no such absurdity. It is not in the power of the legislature to deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers. All charters, and all laws and regulations, to be valid for any purpose, must be capable of con-

struction, and must be construed in conformity to constitutional principles, and in harmony with the general laws of the land; and any by-law which violates any of the recognized principles of legal and equal rights is necessarily void so far as it does so, and void entirely if it cannot be reasonably applied according to its terms.

We must therefore construe this charter, and the powers it assumes to grant, so far as it is not plainly unconstitutional, as only conferring such power over the subjects referred to as will enable the city to keep order, and suppress mischief, in accordance with the limitations and conditions required by the rights of the people themselves, as secured by the principles of law, which cannot be less careful of private rights under a constitution than under the common law.

It is quite possible that some things have a greater tendency to produce danger and disorder in the cities than in smaller towns or in rural places. This may justify reasonable precautionary measures, but nothing further; and no inference can extend beyond the fair scope of powers granted for such a purpose, and no grant of absolute discretion to suppress lawful action altogether can be granted at all. That which is an actual nuisance can be suppressed just so far as it is noxious, and its noxious character is the test of its wrongfulness. There may be substances, like some explosives, which are dangerous in cities under all circumstances, and made dangerous by city conditions; but most dangerous things are not so different in cities as to require more than increased or qualified safeguards; and to suppress things not absolutely dangerous, as an easy way of getting rid of the trouble of regulating them, is not a process tolerated under free institutions. Regulation, and not prohibition, unless under clear authority of the charter, and in cases where it is not oppressive, is the extent of city power.

It has been customary, from time immemorial, in all free countries, and in most civilized countries, for people who are assembled for common purposes to parade together, by day or reasonable hours at night, with banners and other paraphernalia, and with music of various kinds. These processions for political, religious, and social demonstrations are resorted to for the express purpose of keeping up unity of feeling and enthusiasm, and frequently to produce some effect on the public mind by the spectacle of union and numbers. They are a natural product and exponent of common aims, and

valuable factors in furthering them. They are only found to any appreciable extent in places having collected inhabitants, for spectators are generally as important as members. They are among the incidental conditions of city life, and are as much to be expected, on suitable occasions, as any other public meetings, and not necessarily any more dangerous.

They are, however, capable of perversion to bad uses, and when so perverted, may be dangerous. When people assemble in riotous mobs, and move for purposes opposed to private or public security, they become unlawful, and their members and abettors become punishable. These dangers are as well known as the customs themselves are, and are sometimes very great dangers. There may be times and occasions when such assemblies may for a while be dangerous in themselves, because of inflammable conditions among the population. All of these things are as ancient as the law, and are generally within reach of the law, unless the law itself is, for the time, suspended by military necessity. During all this period of public history, cities have existed, and had powers of local administration. But it has never been supposed that they needed or ought to possess any repressive power over these movements which was not subservient and subsidiary to the general legal scheme of government.

It is only when political, religious, social, or other demonstrations create public disturbances or operate as nuisances, or create or manifestly threaten some tangible public or private mischief, that the law interferes. And when it interferes, it does so because of the evil done or apparently menaced, and not because of the sentiments or purposes of the movement, if not otherwise unlawful; and things absolutely unlawful are not made so by local authority, but by general law. All may be capable of legal mischief by perversion or by circumstances. It is lawful to provide for dealing with the mischief, but it is not lawful to go beyond reasonable measures and precautions in anticipating it. Private liberty, and public tranquillity and security, must both be kept in view.

We cannot accede to the suggestion that religious liberty includes the right to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system. There is no legal authority to constrain belief, but no one can lawfully stretch his own liberty of action so as to interfere with that of his neighbors, or violate peace and good order. The whole criminal law might be practically super-

seded if, under pretext of liberty of conscience, the commission of crime is made a religious dogma. It is a fundamental condition of all liberty, and necessary to civil society, that all men must exercise their rights in harmony, and must yield to such restrictions as are necessary to produce that result. It is not competent to make any exceptions either for or against the body of which petitioner is a member because of its theories concerning practical work. In law it has the same right, and is subject to the same restrictions, in its public demonstrations, as any secular body or society which uses similar means for drawing attention or creating interest.

Whatever regulation is made must operate uniformly, under the same conditions. It is competent to hold all persons liable for any actual wrong done which creates dangerous or noxious consequences. That is already provided for under the law of nuisances. These processions might, no doubt, become nuisances, as any others might do so, but it cannot be assumed that they will; and it appears in the record before us that they have been judicially adjudged otherwise when prosecuted. Any doctrine that would hold them legally objectionable in themselves would cover every military or political or society procession that ever assumed respectable proportions. All by-laws made to regulate them must fix the conditions expressly and intelligibly, and not leave them to the caprice of any one. This doctrine, as applied to public officers, was recognized in *Horn v. People*, 26 Mich. 221. It is quite as applicable to the common council, acting by resolution on particular cases. The law must be impartial and general, or it is no law: *Waite v. Local Board of Garston*, L. R. 3 Q. B. 5. It is only where power is given to license that permissive action can be left to particular cases. If this were allowed in the case of processions, it would enable a mayor or council to shut off processions of those whose notions did not suit their views or tastes in politics or religion, or any other matter on which men differ. When men in authority have arbitrary power, there can be no liberty.

It has never been found wise and it is not legally reasonable to do more than fix such general conditions as are necessary to the good order of the community. All persons who resort to cities must accept the inconveniences with the benefits which attend such communities. Those things which must be expected must be endured if they are within bounds of propriety: *Gilbert v. Showerman*, 23 Mich. 448. It is not

unusual to confine noisy doings to such hours of the day and night as will not grossly disturb the quiet rest of sleep. It has been held with reason that a moving crowd may be less obnoxious than a stationary one; and this was said in substance, when a defendant who drew crowds to his windows by libelous pictures, and thereby blocked up a highway, undertook to justify himself by the processions of the judges and lord mayor. The remarks of Mr. Justice Park on the subject of crowds which may or may not be nuisances, in *Rex v. Carlile*, 6 Car. & P. 636, are quite instructive on this head.

Instances might also be suggested of the propriety of suspending noisy demonstrations at particular times or places, or where they would disturb public assemblies, or invalids, or where, for special and peculiar reasons, regulation is needed. It would not be wise to attempt any definition in advance of these things. The legal rule that by-laws must be reasonable is perhaps as definite as it can be made with safety.

This by-law is unreasonable, because it suppresses what is in general perfectly lawful, and because it leaves the power of permitting or restraining processions and their courses to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent legal provisions, operating generally and impartially.

It is also objected to the fifth section of the by-law that it gives to the judge who tries the case a discretion in fixing the penalty up to the highest limit allowed for any purpose by the charter instead of exercising the duty of fixing it absolutely, or within certain bounds, by provisions of by-law. The charter (title 8, section 14), both as amended in 1885 and as standing previously, declares that where authority exists to pass ordinances, the common council may prescribe a fine, penalty, or forfeiture not exceeding five hundred dollars. This is simply putting in words what was implied in all corporate power to pass by-laws at common law. It never can be maintained as a proper construction that the council can, without exercising any discretion themselves, turn over this extravagant power to the courts. It has been the general understanding under the common law that municipal penalties must be fixed, and not fluctuating: See cases cited in Angell and Ames on Corporations, sec. 360. In *Piper v. Chappell*, 14 Mees. & W. 624, the legality of a penalty of five pounds, which might be made smaller, but not less than forty shillings, by the corporation officers, was maintained as being really a fixed penalty of five

pounds, with power of mitigation by the corporation itself, thus reconciling it with the old authorities. How far a sliding scale of penalties is allowable we need not now consider. These are civil and not criminal forfeitures, which, in the absence of other remedies, must be sued for in debt. It has never been customary in our state legislation to leave any discretion in courts upon penalties under highway acts, and others involving no more than violations of legal provisions of a civil nature. It is enough to say that no penalty can be sustained that exceeds in amount what is reasonable, and that the by-law cannot properly impose any sum, sliding or fixed, which exceeds that: See *Grand Rapids v. Hughes*, 15 Mich. 54.

No one in his senses could regard a penalty of five hundred dollars for such trivial offenses as most of those covered by this by-law as within any bound of reason. The penalties must be fixed with regard to the offenses. They cannot all be thrown in together, large and small, under the same measure of punishment. If different classes of acts are considered as of different demerit, the by-law should so classify and punish them. It is probable that no actual abuse has often been committed by the local court in fixing penalties, but, when the law permits, such things are always possible, and, in cases exciting prejudice, are not unlikely to happen. The history of this by-law indicates that the petitioner and his associates have rightly or wrongly become obnoxious to hostile feeling.

As the petitioner was discharged on the hearing, no further order need be entered.

LEGISLATURE EXERCISES SOVEREIGN POWER OVER MUNICIPAL CORPORATIONS, and may create or abolish them, or enlarge, diminish, or otherwise control them, as it may see fit: *Tinsman v. Belvidere etc. R. R. Co.*, 25 N. J. L. 255; 69 Am. Dec. 565; *Mayor v. Groshon*, 30 Md. 436; 96 Id. 591; subject to the provision that in so doing it must not infringe upon the constitutional guaranty to citizens of protection of life, liberty, and property: *Mayor v. State*, 15 Md. 376; 74 Am. Dec. 572.

CONSTITUTIONAL GUARANTY OF RELIGIOUS LIBERTY IS NOT INFRINGED by a statute prohibiting the beating of drums in the compact parts of towns, though the drumming be done in the performance of religious worship: *State v. White*, Sup. Ct. N. H., 1886.

BOURRESEAU v. DETROIT EVENING JOURNAL CO.

[68 MICHIGAN, 425.]

LIBEL. — **OFFICE OF INNUENDO** is to aver the meaning of the language published, and if the meaning of the language is plain, no innuendo is needed, as the use of it can never change the import of the words, nor add to nor enlarge their sense.

LIBEL. — **INNUENDO.** — **WHEN PUBLICATION CONTAINS A DISTINCT** and plain charge, in substance, of official oppression and unwarranted abuse of poor men by officers of the law; of special instances of such abuse by other officers; of a special instance of abuse by plaintiff; and then the general allegation as to mistreatment of "ragged and poor men" by "these fellows," which term "fellows" necessarily and manifestly includes plaintiff, and conveys such meaning to the average reader, — the meaning is sufficiently plain without the aid of any innuendo.

LIBEL. — **INNUENDO.** — **OFFICE OF PLEADING** is to make clear and certain the matters set forth and complained of; and when a publication claimed to be libelous has a clear and certain meaning upon its face, there can be no better pleading than to set out the article in terms and in full when all of it is pertinent to the issue; and the addition of an innuendo, when none is necessary, can add nothing to a clear perception of its meaning, but tends rather to cumber and obscure it.

LIBEL. — **PRIVILEGED COMMUNICATION.** — Publication charging plaintiff with gross misconduct in office, with arresting and handcuffing men without right, and oppressing the poor and friendless under color of his office of deputy sheriff, holds the plaintiff up to the scorn and aversion of honorable men, and the just reproach and censure of good people. Such publication is not a privileged communication; and if untrue, makes the publisher responsible in damages for the injury done by its publication.

LIBEL. — **REPUTATION OF OFFICER** cannot be destroyed or damaged by publication of false imputations upon his morality or honesty without redress.

LIBEL. — **REASON FOR PRIVILEGED COMMUNICATION**, which is supposed to be the accomplishment of the public good by a certain liberty of discussion and publication, cannot be applied to cases where the effect of the exercise of such privilege must necessarily result in public evil as well as private injury. There are cases where the promotion of the public good, in conflict with public evils, existing or to be feared, warrants a freedom of speech and license in publication in good faith which may be of injury to private persons without remedy or compensation to them.

LIBEL. — **QUESTION OF LAW.** — **WHERE PUBLICATION IS PLAINLY LIBELOUS** on its face, and needs no explanation to determine its character in that respect, the court may decide and rule it to be libelous; and if its meaning is plainly not libelous, the court may declare it not actionable, and instruct the jury accordingly.

LIBEL. — **QUESTION FOR JURY.** — Where any doubt exists as to the meaning of a publication, so that extrinsic evidence is needed to determine its character as to being actionable or non-actionable, it is then a question for the jury, under proper instructions, to find its significance.

LIBEL. — **ORDER OF PROOF.** — In libel, as in other actions, while the order of proof is sometimes discretionary, it is not safe practice to call upon the court to pass upon a proposed statement of fact which is irrelevant,

unless shown to apply to the party, without first laying the foundation by showing that the witness can answer as to its application. CAMPBELL, C. J.

LIBEL. — It is NOT COMPETENT IN LIBEL, as in other actions, to prove distinct facts in defense that have not been made a part of the issue as framed; therefore, extraneous specific charges cannot be gone into for any purpose. CAMPBELL, C. J.

IN LIBEL, GENERAL JUSTIFICATION requires the statements to be proved as alleged, and not otherwise. CAMPBELL, C. J.

IN LIBEL, GENERAL STATEMENTS of misconduct, not connected with the party, and not alleged as grounds of action, are not actionable, and proof of them is incompetent. CAMPBELL, C. J.

John A. Bell and F. A. Baker, for the appellant.

Stewart and Galloway, for the plaintiff.

MORSE, J. This is an action for libel. The article complained of was published in the Detroit Evening Journal in its issue of July 29, 1885.

The whole of it is set out in the declaration, and is reproduced here, including the innuendoes inserted by the pleader:—

“UNWARRANTED OUTRAGE.

“Danger of Walking Alone in Ecorse and Springwells—Michael Murphy’s Experience—A Poor Man Nearly Reaches Friends, when He is Arrested and Imprisoned.

“Instances of the outrages practiced upon reputable people who may unfortunately pass through the township of Ecorse, by the justices and constables, keep coming to notice. Michael Murphy, who is employed upon a farm about a half-mile from the village, upon the river road, was in the city this morning, and relates an event in which he took part. ‘One day last June,’ said Mr. Murphy, ‘an old man came along the road, and I fell into conversation with him. He said he came from the southern part of the state, and was going to Detroit, where he had relatives who would care for him. I invited him into the house, and gave him some dinner. In the afternoon the old man started out for Detroit. I had seen George Allen, a constable, who lives on Sand Hill, watching the old man when he came to the house, so I kept an eye on him when he went up the road. The old man had n’t gone far when Allen started after him. I saw his game at once, and started towards them, but Allen got there first, and arrested the old man for being a tramp. We had a hot dispute, but of course Allen rushed his man off. The next day Allen took the man before Justice Haltiner, and he was sent up. That’s the way these fellows

get their fees, and it's an outrage. It's been going on for a long time.' James Kelly, a farm laborer, who works near Mr. Murphy, was with him, and said these occurrences were common. 'Just a little while ago,' he said, 'I was going to Ecorse, walking along the railroad. I had a bag on my arm, and guess I looked a little like a tramp. Allen came along, and stopped me, and asked me a number of questions. He concluded not to arrest me after that, but that was what he intended to do. The other day a man was walking along in front of the house, and Deputy Sheriff Bourreseau [said plaintiff meaning], who keeps a saloon in Ecorse, came along in his [said plaintiff's] buggy. He [said plaintiff meaning] asked the man if he did n't want to ride. The man got into the buggy, and rode towards the village. He saw something was wrong, and started to get out, when Bourreseau [said plaintiff meaning] tried to prevent him. The man, however, jumped out, and pulled a jack-knife, when Bourreseau [said plaintiff meaning] grabbed him. "Let go of me, or I'll stick this into you," yelled the man at Bourreseau [said plaintiff meaning], who released his hold. He called to some farm hands, who came and helped him put the shackles on the man. I don't know what became of him, but I suppose he was sent up. It is n't safe for an honest man, if he is a little ragged, or has n't any money, to walk around Ecorse. These fellows hang around the highways, and arrest every one of them.'"

Under the general issue, the defendant gave notice that it would insist in its defense:—

1. That the article was privileged, the matters therein mentioned being of great public concern, relating to alleged abuses practiced by public officials; that before the publication of the article the doings of some of the officials of the township of Ecorse, and elsewhere in Wayne County, in the making of alleged causeless and unwarranted arrests, and in other alleged abuses of authority, were matters of public comment and discussion; that the defendant, as a public journal, in pursuance of its duty, felt compelled to lay before the public generally the statements gathered by its reporters, in respect of such alleged causeless and unwarranted arrests, and other alleged abuses of authority, to the end that proper remedial measures might and would be adopted; that the article was published in good faith, without malice, and with an honest desire to do the community a service.

2. That the statements contained in said publication of and concerning said plaintiff were true.

Upon the issue thus made a trial was had in the superior court of Detroit, resulting in a verdict and judgment for the plaintiff for three hundred dollars.

The defendant brings error.

The plaintiff made his primary case by introducing the article complained of, the publication of which was admitted, and showing the circulation of the newspaper. He also testified in his own behalf that he lived at Ecorse, and had held the position of deputy sheriff since the 1st of January in that year, and that there was no other deputy sheriff in Ecorse by the name of Bourreseau; that he had seen the article in the Evening Journal, and that there was no truth in it. He then rested.

Defendant's counsel then moved the court to instruct the jury to render a verdict for the defendant, upon the ground that there was no proper innuendo or inducement set forth in the declaration, and nothing for defendant to try, and on the further ground that the article was privileged. The motion was denied, as were also requests to charge in the same direction at the close of the evidence.

The attorney for defendant, in a very able and interesting argument in this court, showing much research and study, earnestly contends that the article complained of is not libelous *per se* as respects the plaintiff; and therefore the declaration, lacking the necessary innuendo to bring out the latent injurious meaning, does not state a cause of action; and that, in order to set forth an actionable libel, there should have been an innuendo distinctly averring that the words, and pointing out the particular words, contained in the publication, bore a specific actionable meaning.

The office of an innuendo is to aver the meaning of the language published.

If the meaning of the publication is plain, therefore, no innuendo is needed. The use of it can never change the import of the words, nor add to nor enlarge their sense.

"An innuendo helps nothing, unless the words to which it is applied have a violent presumption of the innuendo": *Castleman v. Hobbs*, Cro. Eliz. 428.

If the common understanding of man takes hold of the published words, and at once applies, without difficulty or

doubt, a libelous meaning thereto, an innuendo is not needed, and would be but useless surplusage in pleading.

The import and meaning of this article in question seems clear to me. In the language of the learned judge, Hon. J. Logan Chipman, who presided at the trial below: "Taking the head-lines; the introduction to the example given; the instance in which the name of Bourreseau himself is mentioned; the account which follows immediately after it,—all of these render the meaning of the article sufficiently plain. All of these, if the facts stated therein are true, would tend to subject Bourreseau to the highest censure; and when an article does that, it is libelous."

The head-lines speak of unwarranted outrages against poor men, and the danger of walking alone in Ecorse. Then, in the body of the publication, instances are given of outrages practiced upon reputable people who pass through Ecorse by the justices and constables therein, and the article proceeds thereafter to state that the plaintiff enticed a man to get into his buggy to ride. The man, after riding some distance, saw something wrong, and tried to get out. Bourreseau attempted to keep him in the buggy. After a struggle, Bourreseau calls some farm hands, and with their help, shackles the poor fellow, and presumably he is sent up; immediately adding to this description of plaintiff's conduct these words: "It is n't safe for an honest man, if he's a little ragged, or has n't any money, to walk around Ecorse. These fellows hang around the highways, and arrest every one of them."

Here is a distinct and plain charge, in substance, of official oppression, and unwarranted abuse of poor men by the officers of the law. Special instances of such abuse by other officers are given; then a special instance of abuse by the plaintiff; and then, again, the general allegation as to the treatment of ragged and poor men by "these fellows," which term "fellows" necessarily and manifestly includes the plaintiff, without the aid of any innuendo. The average reader knew what the article meant, and what charge of misconduct was imputed therein to plaintiff, and the services of a special pleader were not needed to explain its meaning to the average citizen out of court; nor was it necessary to inform the court or jury, at the trial, what the publication was about, or its import in regard to the action of the plaintiff as an officer in the township of Ecorse.

The office of pleading is to make clear and certain the

matters set forth and complained of; and when a publication claimed to be libelous has a clear and certain meaning upon its face, there can be no better pleading than to set out the article in terms, and in full when all of it is pertinent to the issue; and the addition of an innuendo, when none is necessary, can add nothing to a clear perception of its meaning, but tends rather to cumber and obscure it.

The publication is plainly libelous. It charges the plaintiff with gross misconduct in office; with arresting and handcuffing men without right; and oppressing the poor and friendless under color of his office of deputy sheriff, — offenses against humanity and decency, which, if not punishable as crimes under the laws of our state, certainly ought to be. It holds the plaintiff up, if the charges be true, to the scorn and aversion of all honorable men, and the just reproach and censure of good people.

Nor can the article be said to be privileged. If untrue, the newspaper must be responsible for the damage done by its publication. The reputation of a public officer cannot be destroyed or damaged, by false imputations upon his morality or his honesty, without redress. It serves no useful purpose to the community, who are interested, to falsely blacken the character of a public official, or to destroy the confidence of the people in his integrity. The reason for the privilege, which is supposed to be the accomplishment of the public good by a certain liberty of discussion and publication, cannot be applied to cases where the effect of the exercise of the privilege must necessarily result in public evil as well as private injury. There are cases where the promotion of the public good in a conflict with public evils, existing or to be feared, warrants a freedom of speech and a license in publication, in good faith, which may yet be of injury to private persons, without remedy or compensation to them.

But the distinction between the two classes of cases, and the law of libel upon the subject of privileged publications in this state in relation to public officers and candidates for office, have been heretofore pointed out and elaborated by this court, and further discussion of the question is unnecessary: *Foster v. Scripps*, 39 Mich. 376; 33 Am. Rep. 403; *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251; *Bronson v. Bruce*, 59 Id. 467; 60 Am. Rep. 307.

It is also contended on behalf of defendant that the court below erred in instructing the jury that the publication was

libelous. It is argued that, while it is within the province of the trial judge to take a case away from the jury when in law it is clearly not libelous, yet he has no power to declare an article libelous, and if he thinks it actionable, then the question of libel or no libel is for the jury. We are cited to a large number of English cases as sustaining this proposition. But we are not prepared to accept such doctrine. If the publication, upon its face, is plainly libelous, and no explanation is needed to determine its character in that respect, there is no sound reason in law why the court cannot decide and rule it to be libelous, as well as upon the other hand to declare it not libelous if its meaning is plainly not actionable. There is no good foundation in a rule that makes any such distinction. If the court has any power to pass upon the question at all, there is no reason for making a one-sided restriction of the authority. The true rule is, that if there is any doubt as to the meaning of the publication, so that extrinsic evidence is needed to determine its character as to being actionable or non-actionable, it is then a question for the jury, under proper instructions from the court, to find its significance. If the article itself, standing alone, is plainly libelous, or manifestly wanting in any defamatory meaning, it is the duty of the court to so declare either way, and instruct the jury accordingly: *Townshend on Slander*, sec. 286; *Hunt v. Bennett*, 19 N. Y. 173; *Haight v. Cornell*, 15 Conn. 74; *Levi v. Milne*, 4 Bing. 195; *Wagaman v. Byers*, 17 Md. 183; *Pittock v. O'Niell*, 63 Pa. St. 253; 3 Am. Rep. 544; *Thompson v. Grimes*, 5 Ind. 385; *Mix v. Woodward*, 12 Conn. 262; *Hairs v. Wilson*, 9 Barn. & C. 643; *Fisher v. Clemen.*, 10 Id. 472.

The defense produced a witness, Gasking, who testified that he lived near Royal Oak, and in July, 1885, he, with a friend, was in Ecorse looking for work. Just this side of Ecorse, as they were passing along the highway, his friend, who had a hurt leg, sat down to bandage it, and two men came up. He was proceeding to state what took place there, when objection was made to his testimony as immaterial, unless first connected with the plaintiff.

Counsel for defendant then stated that they proposed to show that the two men were arrested by a constable, who handed one of them over to a deputy sheriff, and both were then taken before a justice, without a warrant, and without any occasion for so doing; that they expected to show that the plaintiff arrested the witness; and that men in the town-

ship of Ecorse, hunting for work, were arrested without cause. The court excluded the evidence, saying: "I will exclude it. There is only one charge against the plaintiff here. There is a charge made against the township, so to speak,—that it is not safe down there. But the facts given are specific. I do not find any specific charge of the kind sought to be proven here by this witness. They charge here in this article one specific instance of getting a man into a buggy for the purpose of arresting him. At the end of the article there is a general statement that no man is safe in that township who is ragged and has no money. There is only one specific charge against this plaintiff, and I cannot admit testimony relating to something else, under the statement you make."

It seems to me that so much of the proffered evidence as would have had a tendency to prove that the plaintiff arrested this witness without cause, and without any occasion for probable cause, was admissible to justify the general allegation of the article that the officers in Ecorse were hanging around the highways, and arresting every man who was ragged and had no money, and that plaintiff was one of the fellows who were engaged in such business. It had no tendency and was not competent to justify the specific allegation of misconduct against him; but it did have a legitimate bearing to show that he did arrest poor travelers through the township without warrant and without cause. A distinct offer was made by Mr. Baker, one of defendant's counsel, to prove by the witness that the plaintiff arrested the witness. It was error not to permit this.

The plaintiff had counted upon the whole article, which contained a general and a specific charge against him, and he could not restrict the defendant's justification to the specific allegation: *Bathrick v. Detroit Post and Tribune Co.*, 50 Mich. 630, 641; 45 Am. Rep. 63. The defendant had a right to establish one charge, or to introduce evidence tending to prove it, even if it could not justify the whole article. While it would not prevent a recovery by the plaintiff, it might, and probably would, have a material bearing upon the amount of damages to be awarded: *Townshend on Slander*, sec. 212; *Sullings v. Shakespeare*, 46 Mich. 413; 41 Am. Rep. 166.

Fred N. Peck, a witness for the defendant, testified that he wrote the article in relation to plaintiff. He stated the circumstances under which the publication was made, and testified that he gained his information from two men,—Murphy

and Kelly,—who, he understood, had just been making complaints to Auditor Moran of the numerous acts of injustice perpetrated in Ecorse. He asked them to repeat the stories to him, which they did; that he took no further steps to investigate the truth of the stories, and talked with no one but these two men, in the presence of Moran, and the conversation with them was in the forenoon of the same day the article was published. He was allowed to testify fully, without objection, to the matter of illegal and unjustifiable arrests in Ecorse being a subject of discussion in the newspapers, and among the people of Detroit generally, about the time of the Evening Journal publication.

He was then asked the following questions:—

“Q. State whether or not it was given out and the charge publicly made in the newspapers, and by Auditor Moran and others, that people were arrested in that township without cause, for the purpose of enabling the justices and the officers to get fees against the county; and that one of the justices of the township had adopted the practice of issuing passports, so that they could go about the township without fear of arrest.”

Objected to as leading and immaterial, and not allowed.

“Q. Were any rumors or charges of that kind made at the county auditor's office?”

Same objection and ruling.

The last question may be technically open to the objection that it is leading, but I think it was competent, as bearing upon the question of defendant's motive in publishing the article, to show that the charge referred to in the first question had been publicly given out by the newspapers, and by Auditor Moran and others. It was in the same line of the evidence the witness had before that given without question. It was the defendant's right to show all the surroundings connected with the publication of the article, and the knowledge the defendant had when the publication was made: *Huson v. Dale*, 19 Mich. 36; 2 Am. Rep. 66; *Scripps v. Foster*, 41 Mich. 746; *Sullings v. Shakespeare*, 46 Id. 413; 41 Am. Rep. 166; *Bathrick v. Detroit Post and Tribune Co.*, 50 Mich. 634; 45 Am. Rep. 63.

I find no errors in the charge of the court, which was an able, lucid, and impartial one. The requests of the defendant were all properly refused, except the tenth, and under the charge of the court, which set forth in what the libel consisted, it is evident the jury did not understand there was any claim made

by the plaintiff that he was charged in the article with making arrests for the purpose of obtaining illegal fees.

For the errors in the rejection of proffered evidence, as above stated, I think the judgment of the court below ought to be reversed, and a new trial granted.

CAMPBELL, C. J. We concur in Judge Morse's views so far as favorable to the judgment. In this case the notice of justification contained no specific averments, and was confined to the statements in the libel concerning the plaintiff. The only such statement was fully gone into on the trial, and was not made out.

It is now claimed that it was competent, either in justification or mitigation, to prove another act not mentioned in the libel, and not justified. This was attempted in this way: A witness named Gasking was sworn, and testified to his passing through Ecorse with another man, named Carey, and had stated that two men came up, when counsel for plaintiff objected unless first connected with plaintiff. Defendant's counsel then stated what he proposed to prove concerning an arrest, but did not state he intended to identify plaintiff. It was then suggested by plaintiff's counsel that, if he would ask witness, he would find he did not mean plaintiff. Then, without asking any question as to plaintiff, another counsel said they proposed to show witness's experience in Ecorse, and to show that plaintiff arrested him, and further to show that men hunting for work were illegally arrested, and taken before Justice Haltiner.

The court ruled out the testimony.

It is very questionable whether, even if admissible otherwise, this could be regarded as improperly ruled out. While the order of proof is sometimes discretionary, it is not a safe practice to call upon a court to pass upon a proposed statement of fact which is irrelevant, unless shown to apply to the plaintiff, without at least laying the foundation by showing that the witness can answer as to its application. Plaintiff's counsel twice proposed to let witness answer whether plaintiff arrested him. Had this been answered in the negative, it would have ended the inquiry. If answered affirmatively, the other questions concerning the illegality of the arrest, and its admissibility under the issue, would have arisen, and could have been dealt with directly. Experience has shown the mischief of allowing parties to get rulings on matters which

the witness may know nothing about, or may know nothing relevant, and it is a practice which deserves no favor.

But this testimony, even if in proper form, was not admissible. It has been decided by our own authorities, and we have no occasion to look further. The practice is settled in this state, as at common law, that it is not competent to prove distinct facts in defense that have not been made part of the issue as framed. No one can be prepared in advance to anticipate every fact, true or false, which may be offered in evidence, and of which he has had no notice. If this charge had been made in the libel, plaintiff could have had an opportunity to meet it, and also to make inquiry into the character and veracity of the witnesses. It is not pretended that defendant, or the author of the libel, had ever heard of it, and relied upon it when the libel was written. There is no principle which will permit such extraneous specific charges to be gone into for any purpose: *Proctor v. Houghtaling*, 37 Mich. 41; *Fowler v. Gilbert*, 38 Id. 292.

A general justification requires the statements to be proved as alleged in the libel, and not otherwise: *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251.

It was not erroneous to exclude the testimony of Mr. Peck concerning general rumors of misconduct in Ecorse not connected with the name of plaintiff. He had in fact been allowed to cover most of this ground, and he had been allowed to give all the rumors and charges he had heard concerning plaintiff, and in this he had given testimony going beyond the established rule that the rumors or reputation must relate to the charge made.

It was held by this court in *Lewis v. Soule*, 3 Mich. 514, that general statements of misconduct not connected with the plaintiff are not actionable, and in the present case the declaration does not count upon any of those statements as ground of action at all. No other rule would be consistent with reason. It is matter of every-day experience that persons are very apt to use exaggerated language concerning the people of places and neighborhoods which neither they nor any one else would regard as injurious to particular individuals not specified. If an action of libel would lie for every person because his large or small surroundings are charged as a region of dishonest or bad persons, the results would be startling.

A somewhat similar question arose in *Rosenbury v. Angell*,

6 Mich. 508, where it was held that a general reference for character to the business men of Penn Yan was too general to allow evidence of inquiries of particular persons. The only possible basis for claiming the relevancy of such testimony would be in mitigation of the general assertions, and they are not legally libelous.

It is still more questionable whether such things as were offered could amount, under any circumstances, to general reputation. The auditor's office is not in Ecorse, and the talk there could not stand on any better footing than gossip in any other office, public or private. It would be very dangerous to permit reputation to be assailed on any such conversation, especially when not naming plaintiff. All that referred to him personally was, in fact, admitted.

The judgment should be affirmed.

Judgment of affirmance was thereupon entered.

OFFICE OF INNUEUDO IS TO EXPLAIN THE MEANING OF WORDS NOT LIBELOUS PER SE, or the application of words used to the plaintiff: *Maynard v. Fire Ins. Co.*, 34 Cal. 48; 91 Am. Dec. 672, and note; note to *Van Vechten v. Hopkins*, 4 Id. 349-351. Where the words used are actionable *per se*, no innuendo is necessary, and it is surplusage: *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455, and note; *Stoll v. Houde*, 34 Minn. 193; *Krause v. Sentinel Co.*, 62 Wis. 660.

PROVINCE OF COURT AND JURY IN ACTIONS FOR LIBEL: See note to *Van Vechten v. Hopkins*, 4 Am. Dec. 351, 352; *Edwards v. Chandler*, 14 Mich. 471; 90 Am. Dec. 249, and note.

WHAT ATTACKS AND CRITICISMS UPON OFFICERS AND CANDIDATES FOR OFFICE ARE PRIVILEGED is discussed in the notes to *Aldrich v. Press Printing Co.*, 86 Am. Dec. 84, and to *Jones v. Townsend's Adm'r*, 58 Am. Rep. 685-692.

IT IS NOT ADMISSIBLE IN DEFENSE TO ACTION FOR LIBEL to prove matters merely aggravatory of main charge: *Fountain v. West*, 23 Iowa, 9; 93 Am. Dec. 405.

WORDS ACTIONABLE PER SE, GENERALLY: See the note to *McFadin v. David*; 41 Am. Rep. 590-592; *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455, and note.

FALSEHOODS AND CALUMNY AGAINST PUBLIC OFFICERS are libelous, and not privileged: *Commonwealth v. Clap*, 4 Mass. 163; 3 Am. Dec. 212; note to *Aldrich v. Press Printing Co.*, 86 Id. 91; *Lansing v. Carpenter*, 9 Wis. 540; 76 Am. Dec. 231, note 282; *Banner Pub. Co. v. State*, 13 Lea, 176; 57 Am. Rep. 214, note 222.

LIBEL, WHEN QUESTION OF LAW FOR THE COURT: *Barrows v. Bell*, 7 Gray, 301; 66 Am. Dec. 479; *Tresca v. Maddox*, 11 La. Ann. 206; 66 Am. Dec. 198.

LIBEL, WHEN QUESTION OF FACT FOR THE JURY: *Tresca v. Maddox*, 11 La. Ann. 206; 66 Am. Dec. 198, and note; *Barrows v. Bell*, 7 Gray, 301; 66 Am. Dec. 479; *Edwards v. Chandler*, 14 Mich. 471; 90 Am. Dec. 249, and note 282.

IN LIBEL, SPECIFIC ACTS OR PARTICULAR OFFENSES not connected with the transaction, and not under investigation, cannot be proved, as such evidence is inadmissible: *Fountain v. West*, 23 Iowa, 9; 92 Am. Dec. 405; *Sheahan v. Collins*, 20 Ill. 325; 71 Am. Dec. 271, and note. See these cases as to proof of justification.

SUTHERLAND v. INGALLS.

[63 MICHIGAN, 620.]

IN TRESPASS FOR PERSONAL INJURY, all circumstances of the transaction may be shown under the general issue to have such effect as they deserve in determining the verdict, by mitigation or otherwise.

TRESPASS—LIABILITY FOR LAWLESSNESS OF OFFICER IN EXECUTING PROCESS. — A party employing an officer to execute lawful process can only be held liable jointly for the trespass and lawlessness of the officer in executing the process, when it is shown that he ordered or encouraged such lawlessness, and then he is liable to the extent of his own misconduct because he is actually a trespasser.

TRESPASS. — One who employs another innocently for a lawful purpose is not liable for his trespasses, and not liable for aggravated and wanton wrongdoing in such damages as would be assessed against him if he sanctioned it.

ONE IS NOT TRESPASSER FOR EMPLOYING OFFICER to execute lawful process. It is his right so to do, and the officer is bound to perform the duty, and cannot be blamed for doing it in a lawful manner.

OFFICERS ARE PRESUMED NOT TO ABUSE THEIR FUNCTIONS, and one lawfully employing them is not liable if they do, unless he orders, encourages, or sanctions it.

B. J. Brown, for the appellant.

A. C. Cook, for the plaintiff.

CAMPBELL, C. J. Plaintiff recovered a verdict below in trespass against both defendants, and Ingalls brings error. The trespass was not *quare clausum fregit*, but for personal violence, committed by Moriarity, who, as an officer, had a writ of possession to serve for a house occupied by plaintiff's husband and herself, which was adjudged to be given up under the landlord-and-tenant act. Ingalls had the writ placed in the hands of Moriarity to serve, and the latter, meeting with opposition from plaintiff, seized and handcuffed her, and kept her so manacled for some time, while he put out the contents of the house, and completed his service.

The general issue was pleaded, with a special plea setting up that what was done was in overcoming unlawful resistance to Moriarity as an officer in service of process.

On the trial the court held that, as there was no valid no-

tice, no justification could be shown, and refused to allow an amendment. It was further said to the jury that Ingalls was jointly and equally liable with Moriarity for all that was done by Moriarity.

We think this was erroneous. It is questionable whether any plea or notice could entirely justify what Moriarity did. But in trespass all the circumstances of the transaction may be shown under the general issue to have such effect as they deserve in determining the verdict, by mitigation or otherwise.

There was no proof of any violence done by Ingalls himself, and none was alleged. He could only be made out a trespasser by showing that he was responsible for the conduct of Moriarity; and he could only be so responsible for what was fairly within the authority, if any, which he gave him. A man who employs another innocently, and for a lawful purpose, is not usually liable for his trespasses, and is not liable for aggravated and wanton wrong-doing in such damages as would be properly visited on him if himself sanctioning or doing it: *Nield v. Burton*, 49 Mich. 53; *Pigott v. Lilly*, 55 Id. 150; *Wood v. Detroit City R'y Co.*, 52 Id. 402; 50 Am. Rep. 259.

No one can be held liable as a trespasser at all for employing an officer to execute lawful process. It is the right of every one to have his regular and valid writ served and enforced. The officers of the law are bound to perform that duty, and cannot be blamed for doing it in a legal manner. Every one has a right to suppose the ministers of the law will not abuse their functions, and no one who lawfully employs them is liable if they do: *Michels v. Stork*, 44 Mich. 2. It is only where the party himself orders or encourages lawlessness that he can be treated as a joint wrong-doer, and then he is liable because he is actually a trespasser, and liable to the extent of his own misconduct.

There is nothing in the record which would justify putting Ingalls and Moriarity on the same footing, and we have discovered nothing to show that he was in any way whatever responsible as a trespasser.

The result of the ruling which put the two defendants in the same equal wrong was a heavy verdict, which may not have been excessive as to Moriarity, but was not in any way sustainable as to Ingalls, and, as he has taken out the writ on his own behalf, the judgment must be vacated as to him, and a new trial granted, with costs.

LIABILITY OF PARTY DIRECTING OFFICER TO EXCUTE PROCESS FOR THE OFFICER'S TRESPASS: See the note to *Kirkwood v. Miller*, 73 Am. Dec. 137-149, on the subject of co-trespassers.

CIRCUMSTANCES WHICH ACCOMPANY TRESPASS, and give character to it, may always be shown either in aggravation or mitigation of damages: *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759.

UNDER GENERAL ISSUE IN TRESPASS, everything directly connected with the acts complained of may be proved to show or to rebut malice: *Perkins v. Towle*, 43 N. H. 220; 80 Am. Dec. 149; *Allred v. Bray*, 41 Mo. 484; 97 Am. Dec. 283; *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759; *Ottawa Gaslight Co. v. Graham*, 28 Ill. 73; 81 Am. Dec. 263.

OFFICERS ARE PRESUMED TO ACT in accordance with law until the contrary is clearly shown: *Dubuc v. Voss*, 19 La. Ann. 210; 92 Am. Dec. 528, and note 529.

LIABILITY OF PARTY FOR UNLAWFUL ACT OF OFFICER: Note to *Kirkwood v. Miller*, 73 Am. Dec. 141 et seq., treating the subject as to sheriffs and constables, and as to the liability of a municipal corporation for the unlawful or unauthorized acts of its officers: See *Lorillard v. Town of Monroe*, 11 N. Y. 392; 62 Am. Dec. 120, and extended note 124; also *Hildorf v. City of St. Louis*, 45 Mo. 94; 100 Am. Dec. 358.

HESSELL v. JOHNSON.

[63 MICHIGAN, 623.]

SURETYSHIP — SUBSTITUTION OF CO-SURETY'S NAME IN BOND. — Where a surety signs an attachment bond on condition that a certain person, whose name is written as co-obligor therein, shall sign it as co-surety, but who, when the bond is presented to him, refuses to sign it, and his name is erased, and another's substituted therefor, without the consent or knowledge of the first surety, the fact that a certain name is on the bond is sufficient to put the parties on inquiry, and the erasure of that name and substitution of another so changes the obligation as to make it cease to be the bond of the first surety, and releases him from obligation thereon.

SURETYSHIP — CONDITION IN BOND. — Surety may make any condition he chooses in signing a bond before delivery; and if a signature, required as a condition to his signing, is not put upon the bond, he is not bound by it.

SURETYSHIP — SIGNATURE OF BOND IN BLANK. — A bond required to be filed in a public office, which is signed in blank by a surety and intrusted to another to be filled out, binds the surety, and the officer, without interest in the matter, and supposed and expected to be in his office, is not bound to leave it and make personal inquiries.

F. D. Mead and F. O. Clark, for the appellants.

A. R. Northrup, and Ball and Hanscom, for the plaintiffs.

CAMPBELL, C. J. Defendants were sued jointly upon an attachment bond given for the release of attached property

belonging to defendant Johnson, who signed the bond as principal, the others being charged as sureties.

It appeared on the trial that Royce signed the bond on the express understanding, which, in our opinion, was equivalent to a condition, that it should be signed also by one John K. Stack as co-surety, and that he had reason to believe this would be done. This condition was made to Johnson, the principal, and, as he claimed and swore, was made known to plaintiffs' attorney before any other surety signed. It appears, without contradiction, that the bond was brought to the sheriff and to the plaintiffs' attorney while Royce was the only surety on it, and that the subsequent procurement of Burns was had without any conference with Royce. Stack refused to sign it at all when asked. There was also testimony that the name of Stack was written as a co-obligor in the condition of the bond, though not in the beginning, when Royce signed, and was erased, and the name of Burns put in its stead.

Immediately on the receipt of the completed bond the property was released. Some time thereafter, but on the same day, there was testimony tending to show that Royce heard of the facts. There was no testimony that he consented to the substitution.

The court below charged the jury that Royce made Johnson his agent to see that the bond was executed, and was bound at once to notify the plaintiffs when he learned that his authority had been abused, and that he was estopped from complaining, and that judgment should be rendered against him.

This ruling entirely ignored the fact that there was testimony tending to show express knowledge of Royce's understanding that Stack was to sign. If the bond was accepted with notice that Royce had never authorized it, and the property discharged with that notice, it is impossible to hold that Royce was in fault for not giving further notice. As to him, there had never been any delivery of the bond at all. A delivery to an associate to have a writing completed is in no sense a delivery. Parties act at their peril who act under notice, and we know of no rule of law requiring a second notice.

If Northrup, the attorney, and Oliver, the sheriff, had no actual notice, the question further comes up concerning implied notice, for if they had either, the defense is complete.

It was held in *Hall v. Parker*, 37 Mich. 590, 26 Am. Rep. 540, that a surety may make any conditions he chooses to make

in signing a bond before it is delivered, and that where it is not signed by a party whose signature was required as a condition of his signing, he would not be bound. In that case the bond was for use in a legal proceeding, and was analagous to the present one. The name of the principal was written in the bond, but he did not sign it, and the surety was held discharged, as he never consented to its being delivered without the principal's signature, and that the form of the bond notified every one of its condition. The same doctrine was held in *Johnston v. Kimball Township*, 39 Mich. 187; 33 Am. Rep. 372. In *Brown v. Probate Judge*, 42 Mich. 501, as in *McCormick v. Bay City*, 23 Id. 457, it was held that a bond required to be filed in a public office, which had been signed in blank by a surety, and intrusted to another person to be filled out, bound the surety, and that the occupant of such an office who had no interest in the matter, and was expected to be found in his office, was not bound to leave the office and make personal inquiries.

But under the decisions before cited, the fact that Stack's name was in the bond was notice enough to at least put the parties on inquiry. By erasing that name they changed the obligation which Royce had signed. It ceased to be his bond at all. If done without his consent after delivery, it would have been such a material alteration as if fraudulent would have made it a forgery.

We think the ruling were erroneous. There was nothing in the case tending to show an estoppel, and had there been, it must have been left to the jury.

The judgment must be reversed, with costs, and a new trial ordered.

DELIVERY OF BOND UPON CONDITION THAT IT SHALL BE EXECUTED BY OTHER PERSONS: See note to *Guild v. Thomas*, 25 Am. Rep. 706-711. Such bonds are generally held to be valid, unless there is something to put the obligee upon inquiry as to its regularity: See *Taylor Co. v. King*, 73 Iowa, 153; 5 Am. St. Rep. 666, and cases cited in note. As to validity of bonds not signed by all who were expected to sign, see note to *Sharp v. United States*, 28 Am. Dec. 679-681.

BOND DELIVERED ON CONDITION. — Where a surety signed an appeal bond, and gave it to the principal on condition that it should be also signed by another, whose name appeared in the body of the bond as a co-surety, and the principal did not secure such additional signature, but erased that name, and delivered the bond, the surety is not liable: *Allen v. Marney*, 65 Ind. 398; 22 Am. Rep. 73, and foot-note; *Ward v. Churn*, 18 Gratt. 801; 98 Am. Dec. 749, note 761. So where the name of the surety agreed to be affixed to the

bond is forged thereon, the surety signing is not liable: *Lynn Co. v. Farrh*, 52 Mo. 75; 14 Am. Rep. 389; see also *Mathias v. Morgan*, 53 Id. 847.

BOND, SIGNING AS SURETY IN BLANK, EFFECT OF: *City of Chicago v. Gage*, 95 Ill. 593; 35 Am. Rep. 182, and foot-note; note to *Phelps v. Call*, 47 Am. Dec. 328; note to *People v. Hartley*, 82 Id. 763.

THE CASE OF *GIBBS v. JOHNSON*, 63 Mich. 671, is founded on the companion bond to that which formed the basis of litigation in the principal case, except that in the former case the name of the co-surety was not inserted in the bond at all, but the spaces for such names were left blank, when the surety, Royce, signed the bonds. He claimed that the bond mentioned in the principal case was on top of this other bond at the time he signed them, and that supposing both to be filled in alike, he signed both, without looking at the bond in this suit. Mr. Northrup, who was attorney for plaintiff Gibbs in this suit, and also for plaintiff Hessel in the principal case, testified that he talked with defendant Johnson, as to whom he would accept as bondsmen in these cases; that said Johnson saw Stack, whose name was originally inserted in the bond named in the principal case, and that he partially agreed to go upon the bonds. The witness then went to Royce, and informed him that if he would sign the bond in this suit there would be no question about Stack's signing it; that Royce said: "Well, you go and get Stack's name on, and I will sign the bond," and thereupon signed; that Johnson then took the bond to Stack, who refused to sign it, whereupon he went to the sheriff and informed him of the fact; that the witness and the sheriff consented to take Burns, who also signed the other bond, and Johnson then had him sign the bond in suit; and that Royce was not consulted further about the matter. It does not appear from the record that Royce made the delivery of this bond dependent upon the condition of Stack's signing it as co-surety; and Royce admits that he did not tell Johnson not to deliver it unless Stack signed it. He told him he would sign the bond if Stack would; and upon Johnson's word that Stack would sign it, he signed it, and intrusted it thereafter to Johnson. He learned that Stack had not signed it the same day, in the afternoon, but took no steps to disown his liability until suit was brought. The court held, Morse, J., delivering the opinion, that when Johnson and Royce signed the bond, the latter giving it to the former, under the facts stated, to have it perfected, in doing so, Royce made Johnson his agent for that purpose; so that his acts, in getting the bond executed, signed, and delivered, were the acts of Royce himself, and estopped him from denying them, and fixed his liability as co-surety on the bond. To the same effect is *Carroll Co. v. Ruggles*, 69 Iowa, 269; 58 Am. Rep. 223. However, it seems to be well settled that when it is made a condition that the bond shall not be delivered until other sureties have signed, the surety signing cannot be held unless the condition is complied with: *Inhabitants etc. v. Shaver*, 50 Me. 36; 79 Am. Dec. 592; *Guild v. Thomas*, 54 Ala. 414; 25 Am. Rep. 703.

NURNEY v. FIREMAN'S FUND INSURANCE COMPANY.

[88 MICHIGAN, 532.]

FIRE INSURANCE—WAIVER OF CONDITION AS TO ARBITRATION TO FIX AMOUNT OF LOSS IN POLICY. — Where the policy provides that in case of loss the matter shall be left to arbitration at the written request of either party, and also provides that no action can be sustained for loss until an award shall have been made, in case of a difference between the parties as to the amount of loss, the above provisions must be read together in construing the policy; and as arbitration can only be had at the written request of one of the parties, and becomes imperative only after such request, which is optional with either party, if neither of them avails himself of such right to arbitrate within five months of the time of loss, it is deemed as waived by both, and an action to recover the loss may be sustained.

FIRE INSURANCE. — AGREEMENT IN POLICY TO ARBITRATE LOSS which is revocable by either party is revoked by bringing an action to recover the loss, but such revocation will not invalidate the policy in the absence of express condition of forfeiture in case of a breach of the agreement.

BEFORE FORFEITURE CAN OCCUR there must be no question but the parties intended to provide for it in the contract under which it is attempted to enforce it, and when the contract is revocable at the pleasure of either party, without condition expressed, a penalty of forfeiture cannot be enforced against either making the revocation.

Henry and Cornville, and Atkinson and Vance, for the appellant.

Hanchett and Stark, for the defendant.

SHERWOOD, J. This action was brought to recover the amount of a loss by fire sustained by the plaintiff, under a policy of insurance issued to him by the defendant, upon a drug-store, and the stock of drugs therein, situate in the village of Oscoda, in the county of Iosco.

The policy was made on the twenty-fifth day of July, 1884, to continue in force one year thereafter. The fire which destroyed the property occurred on the twenty-seventh day of October, 1884, and the next day an appraisal was made, which showed the loss to be about three thousand dollars, while the insurance upon the stock and store amounted to but twelve hundred dollars. The plaintiff's books, invoices, and papers were lost by the fire.

The defendant was properly notified of the loss, and the defendant's agent came to Oscoda several times to adjust the loss, but failed, for the reason, as the company claims, that the plaintiff did not furnish its agent with the proper invoices and other papers from which he could correctly ascertain the loss. Plaintiff claimed, however, his invoices and papers being

lost in the fire, he furnished the company with the best proofs of loss he could under the circumstances; and after repeated negotiations, the parties failed to come to any adjustment of the case, and the plaintiff brought this suit to recover for the loss, to the amount of his policy, on the twenty-fourth day of April, 1885.

This clause appears in the body of the policy, viz.: "This policy is made and accepted in reference to the foregoing and following terms and conditions, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties thereto."

The policy further provides that in case differences shall arise concerning the amount of any loss or damage by fire, after proof thereof has been received in due form by the company, the matter shall, at the written request of either party, be submitted to the judgment of two competent persons, to be mutually appointed by the assured and the company, who, in case of disagreement, shall choose a third, whose award in writing, signed by any two of them, under oath, and submitted in detail, shall be binding on the parties as to the amount of such loss and damage, but shall not decide the liability of the company.

It further provides as follows: "It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

Upon the trial, the plaintiff gave evidence tending to show his loss by fire of the insured property, and of the value of the property destroyed, of giving notice and proof of loss to the defendant, and of the disagreement of the parties as to the amount of the loss. It further appeared, without dispute, that no request was made by either party for an arbitration to determine the amount of the loss.

In submitting the cause to the jury, the court instructed them that the plaintiff could not maintain his suit until the amount of his loss had first been determined by arbitration, or he had given notice to the defendant of his desire to have the same so determined, and the defendant had neglected or refused to comply with the request; and thereupon further instructed the jury to return their verdict for the defendant.

To this instruction the plaintiff excepted, and this exception raises the only question in the case for our consideration.

I think the exception is well taken, and the court erred in giving the instruction. It was held by this court in *Callanan v. Port Huron etc. R'y Co.*, 61 Mich. 15, that an agreement to arbitrate will not bar an action based upon the same grievance. See also *McGunn v. Hanlin*, 29 Id. 480; *Oakwood Retreat Association v. Rathborne*, 65 Wis. 177; Morse on Arbitration, 79.

The agreement that no suit shall be brought in this policy until arbitration had and award made must be read in connection with the clause of the policy providing for the submission and arbitration, in giving it the proper construction.

It will be noticed by a careful perusal of these provisions of the policy that in case of a difference between the company and the assured as to the amount of a loss, arbitration and award are only contemplated or provided for when a written request is made by one of the parties therefor.

In this case, a difference as to the amount of the loss had existed more than five months after the fire occurred, and neither party claimed the right, and expressed in writing a desire, to have the difference settled by arbitration, and never has expressed such desire, as provided by the policy up to the present time. Arbitration becomes imperative only after the written request for one has been made. The request, as it stands in this policy, is optional with either party, and neither of them having availed themselves of the right to arbitrate, it must be deemed waived by both, and in such case the plaintiff was left to the mode of redress provided by the law: *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272; *Scott v. Phoenix Assurance Co.*, 1 Stu. 152.

In this case, the agreement to arbitrate never became operative; and the agreement not to sue, being dependent on the agreement to arbitrate, of course must have become inoperative: *Phoenix Ins. Co. v. Badger*, 53 Wis. 283.

The following authorities I think support in the main the positions herein taken: *Gibbs v. Continental Ins. Co.*, 13 Hun, 611; *Mark v. National Fire Ins. Co.*, 24 Id. 565; 91 N. Y. 663; *Wallace v. German-American Ins. Co.*, 1 McCrary, 335; 2 Wood on Fire Insurance, 1015, 1016; *Schollenberger v. Phoenix Ins. Co.*, 7 Ins. L. J. 697; *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. St. 478; *Reed v. Washington Ins. Co.*, 138 Mass. 572; *Stephenson v. Piscataqua Ins. Co.*, 54 Me. 55; *Cobb v. New England M. M. Ins. Co.*, 6 Gray, 192; *Trott v. City Ins. Co.*, 1 Cliff.

439; *Lasher v. Northwestern Nat. Ins. Co.*, 18 Hun, 98; *Hurst v. Litchfield*, 39 N. Y. 377; 2 Digest of Fire Insurance Decisions, 40, 41.

The arbitration provided for in the policy was a common-law one. It was revocable at the pleasure of either party. Such revocation would not invalidate the policy; neither do I think it was ever intended by the parties that a revocation should carry with it a forfeiture of the contract, or the right of the assured to maintain an action upon it in case of loss. Bringing the action was a revocation of the agreement to arbitrate.

Before a forfeiture can occur there must be no question but the parties intended to provide for it in the contract under which it is attempted to enforce it. I can hardly conceive that under a contract revocable at the pleasure of either party, without condition expressed, a penalty of forfeiture can be enforced against either making the revocation.

The failure of the parties in this case to arbitrate the matter in difference was the fault of the defendant, if it was desired, and it cannot now be urged as a defense to the plaintiff's action.

The judgment must be reversed, with costs, and new trial granted.

PROVISION IN INSURANCE POLICY FOR ARBITRATION at the request of either party in the event of differences does not render such arbitration a condition precedent to the right of the insured to sue for the loss: *Gere v. Council Bluffs*, 67 Iowa, 272; *Menta v. Armenia Fire Ins. Co.*, 79 Pa. St. 478; 21 Am. Rep. 80; *Wynkoop v. Niagara Fire Ins. Co.*, 91 N. Y. 478; 43 Am. Rep. 686.

INSURANCE COMPANY MAY WAIVE DEFECTIVE COMPLIANCE WITH RULES OF INSURANCE: *Helms v. Philadelphia Life Ins. Co.*, 61 Pa. St. 107; 100 Am. Dec. 621; and failure to object may operate as such waiver: *Insurance Co. v. McDowell*, 50 Ill. 120; 99 Am. Dec. 497, and note; *Commercial U. A. Co. v. Hocking*, 115 Pa. St. 407; 2 Am. St. Rep. 562.

FORFEITURES ARE ONLY ENFORCED when there is the clearest evidence that that was what was meant by the stipulations of the parties: *Helms v. Philadelphia Life Ins. Co.*, 61 Pa. St. 107; 100 Am. Dec. 621, and note 625; *Hall v. Delaplaine*, 5 Wis. 206; 68 Am. Dec. 57.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

DE WITT v. VAN SCHOYK.

[110 NEW YORK, 7.]

INJUNCTION WILL BE GRANTED TO PREVENT DEFENDANT FROM CLOSING UP A ROAD BETWEEN HIS LAND AND PLAINTIFF'S, and opening another road on plaintiff's land adjacent to that so closed up, although the damage sustained or apprehended could be satisfied by a pecuniary award. ILLEGAL ACT WHICH, IF COMPLETED, WILL CLOUD PLAINTIFF'S TITLE and diminish its value will be enjoined.

ACTION to enjoin defendant from obstructing a highway, and from using lands of plaintiff as a highway; also to compel defendant to restore the highway to its original place and state. The trial court gave judgment in favor of plaintiff, which was affirmed on appeal to the general term.

Arthur More, for the appellant.

E. H. Hanford, for the respondent.

DANFORTH, J. It is a sufficient statement of the case to say that the premises now owned by the parties were originally the property of Freeman, who held the same as one farm. He conveyed to Rickard and Borrill, and on the 10th of January, 1874, they were divided between Borrill and Rickard, Borrill taking the part laying "east of a public highway running north and south, leading from Scutt's to Merrill's," and Rickard taking west of the highway, and their lands were described as so bounded. The plaintiff succeeded to the title of Rickard, and the defendant to that of Borrill. In 1882, the defendant, without right, closed up this highway, and began

the construction of a new road upon the plaintiff's land. If continued, its effect will be to change or confuse the identity of the boundary between the two farms, render its location doubtful, subject the plaintiff to additional travel on her own land to reach the highway, and open over that land a road through which the public will be led to travel. These acts were found not only to constitute a public nuisance, but to cause special damage to the plaintiff. The trial court therefore sustained the complaint, and awarded equitable relief as that to which the plaintiff was entitled.

In some reasonable view, the evidence sustains the findings of the trial judge, and, upon the facts found, we entertain no doubt that the conclusion of law on which judgment was given properly follows. It might be that the damage sustained or apprehended could be satisfied by a pecuniary award, but the plaintiff is entitled to have the land as she acquired it, nor should she be driven to repeated actions to maintain her right. Moreover, the acts of the defendant are in derogation of the plaintiff's title, and, being calculated to injure her in that respect, would sustain an injunction, although no damage had actually happened. To remove a cloud upon title is a well-recognized head of equity jurisdiction, and the court will, in like manner, interfere to restrain a defendant from proceeding in an illegal act, which, if completed, will necessarily cast a cloud upon that title, and naturally diminish its value: *Oakley v. Trustees*, 6 Paige, 262.

The opinion of the general term discusses, with much fullness, the points presented by the defendant, and subsequently repeated upon this appeal. With the conclusion reached by the special term, and with the approval of that conclusion by the general term, we concur.

The judgment appealed from should therefore be affirmed.

INJUNCTION TO RESTRAIN OBSTRUCTION OR INCLOSURE OF HIGHWAY: See note to *Burlington v. Schwarsman*, 52 Am. Dec. 574-578.

EQUITY WILL INTERFERE TO PREVENT CLOUD from being cast upon title: *Tucker v. Kenniston*, 47 N. H. 267; 93 Am. Dec. 425.

PEOPLE v. LAKE.

[110 NEW YORK, 61.]

INCEST MAY BE COMMITTED WITH ONE'S ILLEGITIMATE CHILD. That the victim of the crime was born out of wedlock constitutes no defense under section 302 of the Penal Code of New York.

THERE IS NO VARIANCE BETWEEN INDICTMENT AND PROOF, when the crime of incest is charged to have been committed with Georgiana Lake, whose full name is shown to be Georgiana Jeanette Lake.

PROSECUTION and conviction for committing the crime of incest.

G. Arnold Moses, for the appellant.

George Gallagher, for the respondent.

FINCH, J. The prisoner was convicted of incest. To linger over the facts or repeat the details of the proof would peril the calmness and cleanness which belong to a judicial record, and we should therefore touch the disgraceful history only at points where necessity compels. The evidence was claimed to be insufficient, but it fairly established the prisoner's guilt, and fully justified the verdict of the jury. If some of it was open to objection, at least no objection was made, and the inference of the defendant's guilt was an easy deduction from the proof. The principal ground of defense asserted is, that the victim of his lust, although his own daughter, was illegitimate, and so, whatever his depravity, it was not the crime of incest. He seduced that daughter's mother, abandoned her and the child for some years, then, returning, took the daughter, just grown into womanhood, for his book-keeper, as he said, seduced her in turn, and now pleads her illegitimate birth—the disgrace which she inherited from her cradle, and inherited from him—as a defense to the charge of which he stands convicted. The law draws no such distinction. If it did, we should be ashamed of it; for the offense, although committed with a daughter born out of wedlock, is not by that fact mitigated or condoned. She stood related to him by consanguinity within the forbidden degrees. That she had no inheritable blood for the purposes of descent and distribution does not alter the actual and natural relation. Kent says, while speaking of the general legislation relative to bastards, “this relaxation in the laws of so many of the states of the severity of the common law rests upon the principle that the relation of parent and child, which exists in this unhappy

case in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity": 2 Kent's Com. *213. It was early held to be unlawful for a bastard to marry within the Levitical degrees (*Hains v. Jeffel*, 1 Ld. Raym. 68),—a doctrine which of necessity recognized relationship and consanguinity.

But our statutes leave no room for any reasonable doubt. The Penal Code, section 302, enacts that "persons being within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit adultery or fornication with each other, shall, upon conviction, be punished," etc. This enactment is taken from the Revised Statutes (pt. 4, c. 1, tit. 5, art. 2, sec. 12), and its reference is to the provision as to marriage (pt. 2, c. 8, tit. 1, art. 1, sec. 3). That declares marriages between parents and children incestuous and void, and specially includes illegitimate as well as legitimate children. Since, therefore, the consanguinity between father and daughter, although the latter be illegitimate, is by law declared to make their marriage incestuous and void, the provision of the Penal Code applies to the same relation, and describes the crime of incest. Beyond its utter want of merit, the defense has no foundation in the law.

A technical variance between the indictment and proof was asserted to exist and pressed upon our attention. The indictment gave the name of the daughter as "Georgiana Towne, commonly known as Georgiana Lake." There was no question of her identity, for she was present during the trial, and was identified by the witnesses. The proof shows that she was named Georgiana Jeanette, and by an abbreviation of the middle name, was generally spoken of as Nettie Lake. It was no misnomer to describe her as Georgiana Lake. Her name was Georgiana, and she was commonly called Lake. Her father acknowledged her as his daughter, and she commonly bore his name, so that her true name in full was Georgiana Jeanette Lake, and it was no variance to describe her as Georgiana Lake, and the question of identity was put at rest by her presence.

Other technical variances were urged, and complaints of the character of some of the testimony. They are not founded upon any exceptions taken by the prisoner, and do not seem to us to justify a conclusion of error in the proceedings.

The judgment should be affirmed.

VARIANCE IN MIDDLE NAME IN INDICTMENT IS IMMATERIAL: *Edmundson v. State*, 17 Ala. 179; 52 Am. Dec. 169; for the law recognizes but one christian name: *Choen v. State*, 52 Ind. 347; 21 Am. Rep. 179, and note 181; *Tucker v. People*, 122 Ill. 583.

MATTER OF DAWSON.

[110 NEW YORK, 114.]

LOSS OF MONEY PAID TO SHERIFF UNDER ATTACHMENT OR GARNISHMENT, resulting from the subsequent absconding of that officer, must be borne by the plaintiff.

MOTION to direct the amendment of a return so as to show that a judgment had been satisfied. An attachment had issued in the suit of *Wilson v. Dawson*, under which a debt due to Dawson from McDowell, Pierce, & Co. had been garnished. Subsequently, at the instance of plaintiff, McDowell, Pierce, & Co., had been required, by order of court, to pay, and had paid, the amount due from them to A. V. Davidson, the sheriff, who misappropriated it, and then absconded. Afterwards, judgment in the action was entered against Dawson, and he paid thereon a sum which, if added to the payment made to the sheriff by McDowell, Pierce, & Co., would satisfy the judgment. Dawson petitioned the court to have a deputy of the absconded sheriff amend his return on the execution, and that the judgment be canceled of record. The petition was granted. The plaintiffs appealed. The general term affirmed the order granting the petition. Whereupon plaintiffs again appealed.

H. D. Hotchkiss, for the appellants.

Robert P. Rudd, for the respondent.

EARL, J. In June, 1885, Wilson and Knowlton commenced an action in the supreme court against Dawson to recover damages for breach of contract, and obtained an attachment against Dawson's property on the ground of his non-residence. The attachment was issued to Alexander V. Davidson, then sheriff of New York County, and he attached a certain debt owing from McDowell, Pierce, & Co. to Dawson. Such proceedings were thereafter taken in that action, on behalf of the plaintiffs, that McDowell, Pierce, & Co. paid upon the debt attached, to Davidson, as sheriff, the sum of \$2,816.43. Thereafter, and before judgment and execution in the action,

Davidson misappropriated the money, and absconded. The question now to be determined is, Who is to bear the loss of the sheriff's misconduct and default, — the plaintiffs or the defendant? We think the loss should fall upon the plaintiffs. If this money had been seized by virtue of an execution, and the defendant had been deprived thereof, it is well settled that the loss would fall upon the plaintiffs, and that to the extent of the property thus taken the judgment and execution would be satisfied: *People v. Hopson*, 1 Denio, 574; *Peck v. Tiffany*, 2 N. Y. 451. In those cases the loss was held to fall upon the judgment creditors, because property of the defendants was taken and lost to them in consequence of legal measures instituted by the creditors. We think the same rule, and for precisely the same reasons, should be applied to a case of property seized by virtue of an attachment. An attachment differs from an execution in that, by virtue of it, the property of the alleged debtor is seized in advance for the satisfaction of any judgment that may thereafter be recovered in the action; and during the pendency of the action the property is held by the attaching officer as security for the judgment thereafter to be recovered. As in the case of an execution, the property is seized at the instigation of the attaching creditor, and for his benefit; and if it is lost to the debtor, the loss should fall upon the creditor, and he should take his remedy against the sheriff upon his official bond.

When one of two innocent parties must suffer by the wrong of a third party, it is frequently difficult to find an intelligible ground for placing the loss upon the one rather than upon the other; and the difficulty is solved, without any other reason, by holding that that one should bear the loss who put it in the power of the third party to commit the wrong. That rule may be applied here. The plaintiffs not only caused the attachment to be issued to the sheriff, but they procured the order which compelled McDowell, Pierce, & Co. to pay the defendant's money to the sheriff.

If this money had been seized by virtue of an execution, it would at once have operated as a payment *pro tanto* upon the execution. Here, in theory of law, the money is in the possession of the sheriff; and when execution was issued to him, it was at once applicable thereon, and must be deemed to have been so applied. If the sheriff had been found within his county, and the execution had actually been delivered to him, he could not have returned the same unsatisfied, but could

have been compelled to return the same satisfied as to the amount of money received by him upon the attachment: Code, sec. 708. And such a return would have been conclusive in favor of the defendant, and would have left the plaintiffs with their remedy against the sheriff for money received by him.

We are therefore of opinion that the order should be affirmed, with costs.

LOSS OF PROPERTY BY DEFAULT OR DISHONESTY OF SHERIFF, while in his hands under execution or attachment, must generally be borne by the plaintiff: *Cornelius v. Burford*, 28 Tex. 203; 91 Am. Dec. 309, and note.

HERRINGTON v. VILLAGE OF LANSINGBURGH.

[110 NEW YORK, 145.]

CITY IS NOT ANSWERABLE FOR ACT OR NEGLIGENCE OF CONTRACTORS WHO ARE CONSTRUCTING A SEWER in one of its streets, and who, while engaged in the prosecution of their work, fire off a blast, whereby plaintiff's horses, then on an adjacent street in perfect repair, are frightened, and the plaintiff, while attempting to control them, suffers serious injuries.

ACTION for damages. Plaintiff was nonsuited, and having appealed to the general term, the judgment of nonsuit was there affirmed.

Edgar L. Furman, for the appellant.

Henry A. Merritt, for the respondent.

EARL, J. The defendant is a municipal corporation, and by its charter is clothed with power to cause the construction of sewers. On the twenty-third day of October, 1878, it made and entered into a contract in writing with Broderick and Ellis for the construction of a sewer in and through one of its streets, called State Street. The specifications for the work provided that all damages arising from blasting to be done in the construction of the sewer should be paid for by the contractors. State Street crossed Market Street at right angles. On the seventh day of December, 1878, the plaintiff came into the village with a team, and tied his horses to a post in Market Street, about fifteen feet from State Street, in front of a grocery, and went into the grocery, and while there the contractors fired a blast in State Street, which frightened the

team. The plaintiff rushed from the grocery, and while attempting to control the team, was severely injured. The place where the blast was fired was about two hundred feet from Market Street, and the team where it was fastened in Market Street was not visible from the place of the blasting. The claim of the plaintiff is, that the defendant is responsible to him for the injury he sustained in consequence of the frightening of the horses by the blast.

At the place where the horses were fastened, the street was in perfect condition, and the horses did not become restless or frightened from anything existing in the street, and the accident was in no way caused by any imperfect condition of the street, but simply by noise resulting from the blast.

If there was any culpable carelessness which caused the injury to the plaintiff, it was that of the contractors. They had entire control of the work and the manner of its performance. They could choose their own time for firing the blasts, and select their own agents and instrumentalities. They could make the charges of powder large or small, and they could, in some degree, smother the blasts so as to prevent falling rocks, and much of the noise of the explosion; or they could carelessly omit all precautions, and for the consequences of their negligence they alone would be responsible. If it was a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractors should have given the notice; but the duty to give it did not devolve upon the village. And for these conclusions the cases of *Pack v. Mayor etc.*, 8 N. Y. 222, *Kelly v. Mayor etc.*, 11 Id. 432, and *McCafferty v. Spuyten Duyvil etc. R. R. Co.*, 61 Id. 178, 19 Am. Rep. 267, are ample authority.

It is conceded by the learned council for the appellant that if the plaintiff had been hit by a fragment of rock thrown by the blast, the defendant would not have been and the contractors would alone have been responsible. So, too, if a fragment of rock had struck one of the horses, or had fallen or passed near them, and thus had frightened them, causing the injury to the plaintiff, within the authorities cited the defendant would not have been responsible. And for precisely the same reason no responsibility rests upon it because the team was frightened by the noise of the explosion. A rule which would cast responsibility upon the defendant for injuries resulting from the noise of the explosion, and exempt it from responsibility for injuries caused by fragments of rock thrown by the

explosion, would rest upon no rational basis, and require distinctions too fine for the practical administration of justice.

The judgment should be affirmed, with costs.

LIABILITY OF CITY FOR NEGLIGENCE OF CONTRACTORS: See the notes to *Detroit v. Beckman*, 22 Am. Rep. 510, 511; *St. Paul v. Seim*, 74 Am. Dec. 761, 762. As to liability for neglect of street contractors, see the note to *Erie v. Caulkins*, 27 Am. Rep. 647-650; and see *Hiladorf v. St. Louis*, 45 Mo. 94; 100 Am. Dec. 357, and note.

TARBELL v. ROYAL EXCHANGE SHIPPING COMPANY.

[110 NEW YORK, 170.]

DELIVERY WHICH WILL DISCHARGE A COMMON CARRIER MAY BE CONSTRUCTIVE.

COMMON CARRIER. — To CONSTITUTE A CONSTRUCTIVE DELIVERY, the carrier must, if practicable, give notice to the consignee of the arrival, and when this has been done, and the goods are discharged in the usual and proper place, and reasonable opportunity afforded to the consignee to remove them, the liability of the carrier as such terminates.

COMMON CARRIER. — DUTY OF CONSIGNEE TO RECEIVE AND TAKE GOODS is as imperative as the duty of the carrier to deliver them. He cannot, at his option, continue the stringent liability of the carrier, but must act promptly in taking the goods. If he does not, the liability of the carrier as an insurer, nevertheless, ends.

CARRIER'S GENERAL DUTY IS NOT ESSENTIALLY VARIED OR LIMITED BY A STIPULATION IN THE BILL OF LADING that the goods are "to be delivered from the ship's deck (when the ship-owner's responsibility shall cease) at the port of New York," nor by a stipulation that the goods were "to be received by the consignees immediately the vessel is ready to discharge, or otherwise they will be landed and stored, at the sole expense and risk of the consignees, in the warehouses provided for that purpose, or in the public store, as the collector of the port shall direct.

CARRIER'S LIABILITY AS CARRIER WAS HELD TO HAVE TERMINATED when it appeared that he gave the consignee prompt notice of the arrival of the goods, and thereafter discharged them at the proper wharf, where they were suffered to remain three days.

THOUGH CARRIER'S LIABILITY AS SUCH HAS TERMINATED BY A CONSTRUCTIVE DELIVERY OF THE GOODS, he remains answerable for the negligence of himself or his servants, whereby goods remaining in his possession are lost.

CARRIER WHO WISHES TO WHOLLY TERMINATE HIS LIABILITY FOR GOODS MUST WAREHOUSE THEM; otherwise he is charged with a duty as bailee or warehouseman to take ordinary care of the property.

CARRIER. — EXCEPTION IN BILL OF LADING AGAINST LOSS BY THEFT WILL NOT RELIEVE THE CARRIER from liability for loss of goods resulting from his negligence in permitting them to be taken from his custody, after they had been constructively delivered to the consignees, by one who took them without intent to steal. This exception must be construed as operating only while the goods are in possession of the carriers as such under the bill of lading.

TRIAL OF A CAUSE UPON THE THEORY THAT THE COMPLAINT INCLUDES A PARTICULAR CAUSE OF ACTION, without objection, precludes the defendant from objecting in the appellate court that such cause was not alleged in the complaint.

ACTION to recover damages for non-delivery of sixty-three slabs of tin, shipped by steamer from Singapore, India, to London, and thence by the Monarch line to New York. When the tin reached New York, notice was given to the assignees of the bill of lading, who obtained a permit at the custom-house for its discharge. Two days later they paid the freight, and obtained an order for the delivery of the tin, addressed to the clerk of the steamer on which it had been shipped. They left the order on the same day with the clerk, indorsed "Deliver to our order only." On the same day the tin was discharged from the vessel. On the next day a weigher, sent by the assignees to defendant's wharf, weighed the tin and divided it into five-ton lots. Three days later it was found that sixty-three slabs were missing; but there was nothing to show when nor by whom they had been taken. The court found that "the part of the wharf where the tin lay was the private wharf of the defendant. It was covered with a substantial building, the doors of which were locked at night. Two watchmen were employed by the defendant to watch the wharf by day and four by night, and due care had been taken in their selection. There was also a competent person in the employ of the defendant to keep a tally of the cargo taken away by merchants, and to take receipts for it." The trial court found for the plaintiff. On appeal to the general term, the judgment was reversed: See 21 Jones & S. 190. From such judgment of reversal this appeal was prosecuted.

Charles Blandy, for the appellants.

William Allen Butler, for the respondent.

ANDREWS, J. The bill of lading contained special clauses defining the obligation of the carrier in respect to the delivery of the goods, and also the duty of the consignees as to receiving them. By the first of the clauses referred to, the goods were "to be delivered from the ship's deck (when the ship-owner's responsibility shall cease) at the port of New York," and by the second it was declared that the goods were "to be received by the consignees immediately the vessel is ready to discharge, or otherwise they will be landed and stored, at the sole expense and risk of the consignees, in the warehouses

provided for that purpose, or in the public store, as the collector of the port of New York shall direct." Among the exceptions in the bill of lading is one against loss by "pirates, robbers, thieves, etc., whether such perils or things arise from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, agents, or other persons in the service of the ship-owner, and occur before, during the voyage, or at the port of discharge." It is conceded that the sixty-three slabs of tin, the value of which the plaintiff seeks to recover in his action, have been lost and have never come to the actual possession of Mayer Brothers & Co., or their assignees. The necessary conclusion from the evidence is, that they were removed from the wharf of the defendant after they had been discharged from the ship, by some one, without authority of the true owner. The finding that they were not taken by theft leads to the alternative conclusion that they were taken by some person other than the true owner, by mistake, but with the passive acquiescence, at least, of the persons in charge of the wharf. If the original taking was not felonious, it is difficult to resist the conclusion that there was a subsequent felonious appropriation, in view of the fact that the property has never been returned, and that all efforts to trace it have proved unavailing. But whether taken by felony or mistake, there can be no reasonable doubt that the tin in question passed from the wharf of the defendants through the usual gate through which goods were taken, and under the observation of the persons in charge. The weight of each slab exceeded one hundred pounds. The ship lay against the wharf. The wharf was inclosed on all sides. On the water side there was a gate for the discharge of cargo onto the pier. There were two other gates, one for the entrance of trucks and one through which the loaded trucks passed on leaving the wharf.

It is a reasonable inference that whether the tin was taken by felony or mistake, the loss would have been prevented if the defendant's agents in charge of the wharf had required from the person taking the tin an exhibition of his authority, and had followed the rule prescribed by the defendant, requiring the gateman to inspect goods passing the gate, and to take receipts from cartmen before permitting goods to leave the wharf. It is not claimed that any authority was exhibited to the defendant's agents other than the original order of Mayer Brothers & Co., indorsed to Lucius Hart & Co., on the

28th, to deliver the twenty-five tons of tin embraced in the order, nor that any receipt was taken by the gateman for the sixty-three missing slabs. The trial judge found, in substance, that the defendant never delivered the tin pursuant to its contract of carriage, but held it, at the time of the loss, in its capacity of carrier, subject to the rigorous liability imposed upon carriers by the common law, except as modified by the bill of lading, and that the tin was not lost by any of the perils excepted in the bill of lading. But the trial judge placed the right of the plaintiff to recover on an additional ground, viz., actual negligence on the part of the defendant's agents and servants in the care of the goods while on the wharf, by reason of which they were lost; and held that, assuming it was not liable as carrier under the contract of affreightment, it was liable for a breach of duty to use ordinary care in the protection and preservation of the goods.

We concur in the conclusion of the general term that the judgment of the trial court cannot be supported on the liability of the defendant, as carrier, under the bill of lading. The general principle that the duty and obligation of a common carrier by water does not *ipso facto* cease on the unloading of goods from the ship and their deposit upon a wharf, and especially where the place of discharge is also the terminus of the particular voyage, is the settled doctrine of this court, and the generally accepted doctrine of the maritime law. The obligation of the ship-owner is not only to carry the goods to the port of destination, but to deliver them there to the consignee. But a delivery which will discharge the carrier may be constructive, and not actual. To constitute a constructive delivery, the carrier must, if practicable, give notice to the consignee of the arrival, and when this has been done, and the goods are discharged in the usual and proper place, and reasonable opportunity afforded to the consignee to remove them, the liability of the carrier, as such, terminates. The duty of the consignee to receive and take the goods is as imperative as the duty of the carrier to deliver. Both obligations are to be reasonably construed, having reference to the circumstances. The stringent liability of the carrier cannot be continued at the option or to suit the convenience of the consignee. The consignee is bound to act promptly in taking the goods; and if he fails to do so, whatever other duty may rest upon the carrier in respect to the goods, his liability as insurer is, by such failure, terminated: *Redmond v. Liverpool*

Co., 46 N. Y. 578; 7 Am. Rep. 390; *Hedges v. Hudson R. R. Co.*, 49 N. Y. 223.

In the present case, prompt notice of the arrival of the goods was given by the defendant to Mayer Brothers & Co. They were discharged from the ship on Monday, September 27th, and deposited on the proper wharf. The consignees had three full days thereafter in which they could have removed the tin before the 1st of December, the day when the loss was discovered. They were not prevented from removing it from the wharf during those days by any act of the defendant, or by any *vis major*, and it is very clear that its removal during that time was practicable in the exercise of due diligence by the consignees: *Richardson v. Goddard*, 23 How. 28. Under these circumstances, the defendant, under the authorities, must be held to have made delivery of the tin under its contract as carrier, and to have discharged itself from its custody as such; and as the loss, upon the evidence and findings, must be held to have occurred after notice to the consignees of arrival, and the lapse of a reasonable time for the removal of the tin from the wharf, the general term properly overruled the first ground of liability asserted by the plaintiff. The general duty of a carrier to deliver, and of a consignee to receive, as defined in the authorities to which we have referred, is not, we think, essentially changed by the clause in the bill of lading that the goods are to be delivered "from the ship's deck, when the ship-owner's responsibility shall cease," or by the clause that the goods are to be received by the consignee "immediately the vessel is ready to discharge": *Collins v. Burns*, 63 N. Y. 1; *Gleadell v. Thomson*, 56 Id. 194. The defendant, in our view, is not liable as carrier, for the reason that it had made delivery as such according to the general rule governing the liability of carriers by water.

But this conclusion does not meet the other ground of liability asserted and found by the trial court, viz., that the defendant neglected to exercise due and proper care of the tin, and negligently permitted it to be taken from its wharf by strangers, which is the substance of the findings on this branch of the case. It is claimed by the learned counsel for the respondent that this cause of action was not alleged in the complaint, and that the action was brought exclusively upon the contract of affreightment, and the duty of the defendant to make delivery under the bill of lading. The case was tried upon both theories of liability, and no objection was made that a cause

of action for negligence, in not properly caring for the tin after the strict liability of the defendant as carrier has ceased, was not within the issues. It is now too late to take this objection: *Wellington v. Morey*, 90 N. Y. 656; *Vann v. Rouse*, 94 Id. 407. There can be no doubt, we suppose, that in many cases a carrier's whole duty in respect to goods carried by him is not discharged by a constructive delivery terminating his strict responsibility as carrier. Although a consignee may neglect to accept or receive the goods, the carrier is not thereby justified in abandoning them, or in negligently exposing them to injury. The law enables him to wholly exempt himself from responsibility in such a contingency by giving him the right to warehouse the goods. When this is done, he is no longer liable in any respect, and if they are subsequently lost by the negligence of the warehouseman, the carrier is not liable: *Redmond v. Liverpool Co.*, 46 N. Y. 578; 7 Am. Rep. 390, and cases cited. But so long as he has the custody of the goods, although there has been a constructive delivery which exempts him from liability as carrier, there supervenes upon the original contract of carriage by implication of law a duty as bailee or warehouseman to take ordinary care of the property. This duty of ordinary care rested upon the defendant in this case. The tin, it is true, was placed by the act of the defendant under the dominion of the consignees for the purposes of weighing and removal; but nevertheless, as between the defendant and the consignees and their assignees, the actual custody of the part not removed by the consignees or their assignees remained at all times in the defendant. It was deposited on its private wharf, to which alone it, its servants, and those permitted by it, had access. The tin could not have been removed against their consent. It was, in fact, removed by some one unknown, by their tacit acquiescence, doubtless without any fraud on their part, but nevertheless, its removal by a stranger was made possible by reason of an omission on the part of the defendant's servants to take the precautions against misdelivery which the defendant had deemed it proper to prescribe to prevent such an occurrence. The trial court found that the omission to take these precautions was negligence. We do not perceive why this finding is not supported by evidence. If there was negligence on the part of the servants of the defendant which occasioned or contributed to the loss, the doctrine of *respondet superior* applies, and makes it in law the negligence of the defendant. The

delay of the consignees in removing the tin had no legal connection with this breach of duty by the defendant, and cannot justly be considered as a concurring cause of the loss. The exceptions in the bill of lading of loss by thieves, etc., do not exempt the defendant from liability, for the reasons,—1. That it was found by the trial court that the tin was not lost by theft; and 2. By the true construction of the contract the perils excepted were those which should happen before or during the voyage, and while the goods were in the possession of the carriers as such under the bill of lading.

Upon the whole case, we are of opinion that the original judgment is supported upon the ground of actual negligence of the defendant after the contract of carriage had been performed in omitting to exercise ordinary care in the custody of the tin. It was found by the trial judge, upon the request of the counsel for the defendant, that the plaintiff owned, by assignment, the claim in suit, and no question can now be made as to the right of the plaintiff to maintain the action.

For the reasons stated, we think the general term erred in reversing the judgment, and the order of reversal should therefore be reversed, and the judgment of the trial court affirmed.

WHAT IS SUFFICIENT DELIVERY TO TERMINATE LIABILITY OF COMMON CARRIER: See the notes to *Ostrander v. Brown*, 8 Am. Dec. 214-219, and *Farmers' etc. Bank v. Champlain T. Co.*, 42 Id. 497. Carrier is bound to give consignee notice of arrival of goods, and a reasonable opportunity to take them away, and thereafter he holds them simply as a warehouseman, and is liable only for ordinary negligence: *McMillan v. Michigan S. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208; *Hermann v. Goodrich*, 21 Wis. 543; 94 Am. Dec. 563; *Adams Exp. Co. v. Darnell*, 31 Ind. 20; 99 Am. Dec. 582; *Shenk v. Philadelphia S. P. Co.*, 60 Pa. St. 109; 100 Am. Dec. 541. Failure of the consignee to take goods away at the earliest practicable moment is held to operate as a consent that the goods shall remain in the carrier's possession under the more limited liability of a warehouseman: *Wood v. Crocker*, 18 Wis. 345; 86 Am. Dec. 773.

WRIGHT v. BANK OF METROPOLIS.

[110 NEW YORK, 227.]

DAMAGES.—ONE WHO SUFFERS FROM A BREACH OF A CONTRACT MUST SO ACT AS TO MAKE HIS DAMAGES as small as he reasonably can. He must not, by inattention, want of care, or inexcusable negligence, permit his damage to grow, and then charge it all to the other party.

DAMAGES FOR CONVERSION OF PROPERTY, IN GOOD FAITH AND UNDER A MISTAKE AS TO ITS OWNER'S RIGHTS, are not measured by the highest market price up to the day of the trial. In such a case, the duty of the

injured party is to repurchase the property in a reasonable time; and whether he does so or not, his damages cannot exceed the highest price reached within a reasonable time after he has learned of such conversion.

WHAT IS A REASONABLE TIME in which person whose stock has been converted by one acting in good faith should repurchase stock of like amount to fix the measure of damages is, when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, a question of law.

ACTION to recover damages for converting certain stocks, the property of Benjamin H. Wright, which had been delivered by him to Henry C. Elliott to be used as collateral security to the latter's note, but not to be sold for six months. The stock was put in the hands of defendant to secure moneys due from Elliott, who, about January 23, 1878, informed defendant that Mr. Wright consented to the sale of the stock. The Mr. Wright who so assented was not the owner of the stock, but his son. On the 29th of January, 1878, the stock was sold, and the owner became aware of the sale on the 9th of May following, at which time he demanded the stock, and tendered the amount which it had been held to secure. He began his action October 7, 1879. The stock reached its highest price February 14, 1881, to wit, \$18,008. The jury were instructed that in the event of their giving their verdict for plaintiff, they should award him as damages the highest market value of the stock between the date of its conversion and a reasonable time thereafter; and that they should, without being influenced by passion or prejudice, determine what, under all the circumstances, was a reasonable time within which to commence the action, and also what was reasonable diligence in prosecuting it. Verdict for plaintiff for \$3,891.25. The evidence did not show when, if ever, the stock was of that value. Both parties, being dissatisfied, moved to set aside the verdict, the plaintiff, because he conceived himself entitled to the highest market value of the stock at any time prior to the trial, and the defendant, because it thought the damages excessive. The court granted the plaintiff's motion, but denied defendant's. The general term, on appeal, reversed the order granting plaintiff a new trial, and directed judgment to be entered on the verdict. Both parties again appealed.

W. E. Scripture, for the plaintiff.

John Delahunty and Joseph H. Choate, for the defendant.

PECKHAM, J. This case comes before us in a somewhat peculiar condition. As both parties appeal from the same

judgment, which is for a sum of money only, it would seem as if there ought not to be much difficulty in obtaining its reversal. It is obvious, however, that a mere reversal would do neither party any good, as the case would then go down for a new trial, leaving the important legal question in the case not passed upon by this court. This, we think, would be an injustice to both sides. The case is here, and the main question is in regard to the rule of damages, and we think it ought to be decided. By this charge, the case was left to the jury to give the highest price the stock could have been sold for intermediate its conversion and the day of trial, provided the jury thought, under all the circumstances, that the action had been commenced within a reasonable time after the conversion, and had been prosecuted with reasonable diligence since. Authority for this rule is claimed under *Romaine v. Van Allen*, 26 N. Y. 309, and several other cases of a somewhat similar nature referred to therein. *Markham v. Jaudon*, 41 Id. 235, followed the rule laid down in *Romaine v. Van Allen*, *supra*. In these cases, a recovery was permitted which gave the plaintiff the highest price of the stock between the conversion and the trial. In the *Markham* case, the plaintiff had not paid for the stocks, but was having them carried for him by his broker (the defendant) on a margin. Yet this fact was not regarded as making any difference in the rule of damages, and the case was thought to be controlled by that of *Romaine*.

In this state of the rule the case of *Matthews v. Coe*, 49 N. Y. 57-62, came before the court. The precise question was not therein involved, but the court (per Church, C. J.) took occasion to intimate that it was not entirely satisfied with the correctness of the rule in any case not special and exceptional in its circumstances, and the learned judge added that they did not regard the rule as so firmly settled by authority as to be beyond the reach of review whenever an occasion should render it necessary. One phase of the question again came before this court, and in proper form, in *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507, where the plaintiff had paid but a small percentage on the value of the stock, and his broker, the defendant, was carrying the same on a margin, and the plaintiff had recovered in the court below, as damages for the unauthorized sale of the stock, the highest price between the time of conversion and the time of trial. The rule was applied to substantially the same facts as in *Mark-*

ham v. Jaudon, supra, and that case was cited as authority for the decision of the court below. This court, however, reversed the judgment, and disapproved the rule of damages which had been applied. The opinion was written by that very able and learned judge, Rapallo, and all the cases pertaining to the subject were reviewed by him, and in such a masterly manner as to leave nothing further for us to do in that direction. We think the reasoning of the opinion calls for a reversal of this judgment.

In the course of his opinion the judge said that the rule of damages, as laid down by the trial court, following the case of *Markham v. Jaudon, supra*, had "been recognized and adopted in several late adjudications in this state in actions for the conversion of property of fluctuating value; but its soundness, as a general rule applicable to all cases of conversion of such property, has been seriously questioned, and is denied in various adjudications in this and other states." The rule was not regarded as one of those settled principles in the law, as to the measure of damages, to which the maxim *stare decisis* should be applied. The principle upon which the case was decided rested upon the fundamental theory that in all cases of the conversion of property (except where punitive damages are allowed), the rule to be adopted should be one which affords the plaintiff a just indemnity for the loss he has sustained by the sale of the stock; and in cases where a loss of profits is claimed, it should be, when awarded at all, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the complainant would not have averted.

The rule thus stated, in the language of Judge Rapallo, he proceeds to apply to the facts of the case before him. In stating what, in his view, would be a proper indemnity to the injured party in such a case, the learned judge commenced his statement with the fact that the plaintiff did not hold the stocks for investment, and he added, that if "they had been paid for and owned by the plaintiff, different considerations would arise; but it must be borne in mind that we are treating of a speculation carried on with the capital of the broker and not of the customer. If the broker has violated his contract, or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has

been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done."

The whole reasoning of the opinion is still based upon the question as to what damages would naturally be sustained by the plaintiff in restoring himself to the position he had been in; or in other words, in repurchasing the stock. It is assumed in the opinion that the sale by the defendants was illegal and a conversion, and that plaintiff had a right to disaffirm the sale, and to require defendants to replace the stock. If they failed, then the learned judge says the plaintiff's remedy was to do it himself, and to charge the defendants with the loss necessarily sustained by him in doing so. Is not this equally the duty of a plaintiff who owns the whole of the stock that has been wrongfully sold? I mean, of course, to exclude all question of punitive damages resting on bad faith. In the one case the plaintiff has a valid contract with the broker to hold the stock, and the broker violates it, and sells the stock. The duty of the broker is to replace it at once upon the demand of the plaintiff. In case he does not, it is the duty of the plaintiff to repurchase it. Why should not the same duty rest upon a plaintiff who has paid in full for his stock, and has deposited it with another conditionally? The broker who purchased it on a margin for the plaintiff violates his contract and his duty when he wrongfully sells the stock, just as much as if the whole purchase price had been paid by the plaintiff. His duty is in each case to replace the stock upon demand, and in case he fails so to do, then the duty of the plaintiff springs up, and he should repurchase the stock himself. This duty, it seems to me, is founded upon the general duty which one owes to another, who converts his property under an honest mistake, to render the resulting damage as light as it may be reasonably within his power to do.

It is well said by Earl, J., in *Parsons v. Sutton*, 66 N. Y. 92, that "the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can. He must not, by inattention, want of care, or inexcusable negligence, permit his damage to grow, and then charge it all to the other party. The law gives him all the redress he should have by indemnifying him for the damage which he necessarily sustains." See also *Dillon v. Anderson*, 43 Id. 231; *Hogle v. New York Central etc. R. R. Co.*, 28 Hun, 363, the latter case being an action of tort. In such a case as this, whether

the action sounds in tort or is based altogether upon contract, the rule of damages is the same: Per Denio, C. J., in *Scott v. Rogers*, 81 N. Y. 676; and per Rapallo, J., in *Baker v. Drake*, *supra*. The rule of damages as laid down in *Baker v. Drake*, *supra*, in cases where the stock was purchased by the broker on a margin for plaintiff, and where the matter was evidently a speculation, has been affirmed in the later cases in this court: *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owens*, 90 Id. 368. In both cases the duty of the plaintiff to repurchase the stock within a reasonable time is stated. I think the duty exists in the same degree where the plaintiff had paid in full for the stock, and was the absolute owner thereof. In *Baker v. Drake*, *supra*, the learned judge did not assume to declare that in a case where the pledgor was the absolute owner of the stock, and it was wrongfully sold, the measure of damages must be as laid down in the Romaine case. He was endeavoring to distinguish the cases, and to show that there was a difference between the case of one who is engaged in a speculation with what is substantially the money of another, and the case of an absolute owner of stock which is sold wrongfully by the pledgee. And he said that at least the former ought not to be allowed such a rule of damages. It can be seen, however, that the judge was not satisfied with the rule in the Romaine case, even as applied to the facts therein stated. In his opinion he makes use of this language: "In a case where the loss of probable profits is claimed as an element of damage, if it be ever allowable to mulct a defendant for such a conjectural loss, its amount is a question of fact, and a finding in regard to it should be based upon some evidence." In order to refuse to the plaintiff in that case, however, the damages claimed, it was necessary to overrule the Markham case, which was done.

Now, so far as the duty to repurchase the stock is concerned, I see no difference in the two cases. There is no material distinction in the fact of ownership of the whole stock which should place the plaintiff outside of any liability to repurchase after notice of sale, and should render the defendant continuously liable for any higher price to which the stock might rise after conversion and before trial. As the same liability on the part of defendant exists in each case to replace the stock, and as he is technically a wrong-doer in both cases, but in one no more than in the other, he should respond in the same measure of damages in both cases, and that measure is

the amount which, in the language of Rapallo, J., is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would not have averted. The loss of a sale of the stock at the highest price down to trial would seem to be a less natural and proximate result of the wrongful act of the defendant in selling it when plaintiff had the stock for an investment than when he had it for a speculation; for the intent to keep it as an investment is at war with any intent to sell it at any price, even the highest. But in both cases the qualification attaches that the loss shall only be such as a proper degree of prudence on the part of the complainant would not have averted; and a proper degree of prudence on the part of the complainant consists in repurchasing the stock after notice of its sale, and within a reasonable time. If the stock then sells for less than the defendant sold it for, of course the complainant has not been injured, for the difference in the two prices inures to his benefit. If it sells for more, that difference the defendant should pay.

It is said that as he had already paid for the stock once, it is unreasonable to ask the owner to go in the market and repurchase it. I do not see the force of this distinction. In the case of the stock held on margin, the plaintiff has paid his margin once to the broker, and so it may be said that it is unreasonable to ask him to pay it over again in the purchase of the stock. Neither statement, it seems to me, furnishes any reason for holding a defendant liable to the rule of damages stated in this record. The defendant's liability rests upon the ground that he has converted, though in good faith and under a mistake as to his rights, the property of the plaintiff. The defendant is, therefore, liable to respond in damages for the value. But the duty of the plaintiff to make the damages as light as he reasonably may rests upon him in both cases; for there is no more legal wrong done by the defendant in selling the stock which the plaintiff has fully paid for than there is in selling the stock which he has agreed to hold on a margin, and which agreement he violates by selling it. All that can be said is, that there is a difference in amount, as in one case the plaintiff's margin has gone, while in the other the whole price of the stock has been sacrificed. But there is no such difference in the legal nature of the two transactions as should leave the duty resting upon the plaintiff in the one case to repurchase the stock, and in the other case should wholly

absolve him therefrom. A rule which requires a repurchase of the stock in a reasonable time does away with all questions as to the highest price before the commencement of the suit, or whether it was commenced in a reasonable time or prosecuted with reasonable diligence, and leaves out of view any question as to the presumption that plaintiff would have kept his stock down to the time when it sold at the highest mark before the day of trial, and would then have sold it, even though he had owned it for an investment. Such a presumption is not only of quite a shadowy and vague nature, but is also, as it would seem, entirely inconsistent with the fact that he was holding the stock as an investment. If kept for an investment, it would have been kept down to the day of trial; and the price at that time there might be some degree of propriety in awarding, under certain circumstances, if it were higher than when it was converted. But to presume in favor of an investor that he would have held his stock during all of a period of possible depression, and would have realized upon it when it reached the highest figure, is to indulge in a presumption which, it is safe to say, would not be based on fact once in a hundred times. To formulate a legal liability based upon such presumption, I think is wholly unjust in such a case as the present. Justice and fair dealing are both more apt to be promoted by adhering to the rule which imposes the duty upon the plaintiff to make his loss as light as possible, notwithstanding the unauthorized act of the defendant, assuming, of course, in all cases that there was good faith on the part of the defendant.

It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which he could go in the market and repurchase it. What is a reasonable time when the facts are undisputed, and different inferences cannot reasonably be drawn from the same facts, is a question of law: *Colt v. Owens*, 90 N. Y. 368; *Hedges v. Hudson River R. R. Co.*, 49 Id. 223.

We think that, beyond all controversy in this case, and taking all the facts into consideration, this reasonable time had expired by July 1, 1878, following the 9th of May of the same year. The highest price which the stock reached during that period was \$2,795, and as it is not certain on what day

the plaintiff might have purchased, we think it fair to give him the highest price it reached in that time. From this should be deducted the amount of the check and interest to the day when the stock was sold; as then, it is presumed, the defendant paid the check with the proceeds of the sale.

In all this discussion as to the rule of damages, we have assumed that the defendant acted in good faith, in an honest mistake as to its right to sell the stock, and that it was not a case for punitive damages. A careful perusal of the whole case leads us to this conclusion. It is not needful to state the evidence; but we cannot see any question in the case showing bad faith, or indeed, any reason for its existence. The fact is uncontradicted that the defendant sold the stock upon what its officers supposed was the authority of the owner thereof given to them by Elliott.

The opinion delivered by the learned judge at general term, while agreeing with the principle of this opinion as to the rule of damages in this case, sustained the verdict of the jury upon the theory that if the plaintiff had gone into the market within a reasonable time, and purchased an equivalent of the stocks converted, he would have paid the price which he recovered by the verdict. This left the jury the right to fix what was a reasonable time, and then assumed there was evidence to support the verdict. In truth there was no evidence which showed the value of the stock to have been anything like the amount of the verdict, for the evidence showed it was generally very much less, and sometimes very much more. But fixing what is a reasonable time ourselves, it is seen that the stock within that time was never of any such value.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

WHETHER SAME RULE OF DAMAGES SHOULD BE ADOPTED IN TROVER, where property is taken by mistake as where the taking was by design, is said to be an open question, in *Weymouth v. Chicago etc. R'y Co.*, 17 Wis. 550; 84 Am. Dec. 763. The question is discussed in the note to *Tilden v. Johnson*, 36 Am. Rep. 770.

DUTY OF PARTY WHOSE PROPERTY HAS BEEN CONVERTED OR DESTROYED TO REPURCHASE LIKE PROPERTY TO MITIGATE OR FIX THE MEASURE OF DAMAGES. — The duty of one whose property has been converted or destroyed to make reasonable exertions to replace it by repurchasing like property would seem to be well founded upon the general duty which, as stated in the principal case, one person owes to another who converts his property under an honest mistake to render the resulting damage as light as it may be rea-

sonably within his power to do. The rule, in brief, is, that in cases of contract as well as of tort it is generally incumbent upon an injured party to do whatever he reasonably can, and to improve all reasonable and proper opportunities to lessen the injury: *Chamberlin v. Morgan*, 68 Pa. St. 168; *Miller v. Mariners' Church*, 7 Me. 51; *Sutherland v. Wyer*, 67 Id. 64; *Grindle v. Eastern Express*, 67 Id. 317. He must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses, and diminish the responsibility of the party in default to him: *Railroad Co. v. Ragsdale*, 46 Miss. 459; *Railroad Co. v. Echols*, 54 Id. 264. It is the application of this principle which requires the innocent party to a broken contract of hire of services to earn what he can in other ways, and thus diminish the damages to be paid by the other party: *Chamberlin v. Morgan*, 68 Pa. St. 168; *Sutherland v. Wyer*, 67 Me. 167. So in an action to recover damages occasioned to the plaintiff's woods by a fire alleged to have been caused by the negligence of the defendant, it was held that if the plaintiff, when he discovered the fire, neglected to use reasonably practicable means to suppress it, he could not recover for subsequent damages: *Hogle v. New York etc. R. R. Co.*, 28 Hun, 363. So in trespass for removing a few rods of fence, the cost of repairing it, and not the injury to the following year's crop caused by cattle passing through the gap in the fence, was held to be the measure of damages in favor of the plaintiff, who knew the fence was down, and neglected to repair it: *Loker v. Damon*, 17 Pick. 284. And where the plaintiff's cow was made dangerously sick by eating poisoned hay purchased of the defendant, it was held to be the duty of the plaintiff to employ the best remedies within reasonable reach, at reasonable trouble and expense, to cure the cow: *French v. Vining*, 102 Mass. 132; 3 Am. Rep. 440. The principle running through all these cases is well illustrated in its application to the facts before the court in the principal case, and to a similar state of facts in other cases cited in the opinion. So in an action for the conversion of certain barrels of whisky, the plaintiff was allowed to recover as damages the highest market price of the same quality of whisky between the time of conversion and time of trial, which was held to be error. And the measure of damages in actions for the conversion of property, in cases where there is no ground for exemplary damages, is thus stated: "If the property converted consists of merchandise which is ordinarily bought and sold in the market for the purpose of traffic, the plaintiff is entitled to recover the highest market price which that kind of merchandise may have reached between the time of the conversion and a reasonable time within which to replace it, or to bring the action; that what is a reasonable time depends upon the circumstances of the particular case, and where the facts are undisputed, is a question of law": *Daly, O. J., in Devlin v. Pike*, 5 Daly, 85, 95. In this case, the court recognized and applied the rule, that in civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or in tort, except in those special cases in which punitive damages are allowable: *Id.* 87. Compare *Brewster v. Van Lien*, 119 Ill. 554; 59 Am. Rep. 823; *Cothran v. Ellis*, 107 Ill. 413; *Ingram v. Rankin*, 47 Wis. 406; 32 Am. Rep. 762; *Page v. Fowler*, 30 Cal. 412; 2 Am. Rep. 462.

CHAPMAN v. CITY OF ROCHESTER.

[110 NEW YORK, 273.]

A CITY MAY BE ENJOINED FROM MAINTAINING SEWERS BY WHICH SEWAGE IS COLLECTED and then carried upon plaintiff's lands, whereby waters there used by him are polluted and the banks of a stream are covered by filthy and unwholesome sediment.

ESTOPPEL. — ACQUIESCENCE IN THE PROCEEDINGS OF A CITY IN DEVISING AND CARRYING OUT A SYSTEM OF SEWERAGE will not estop the plaintiff from enjoining a nuisance created by such system, if he did not, by word or act, induce the city authorities to so direct the sewers that their flow should reach his premises.

TO PREVENT THE POLLUTION OF AIR OR WATER, an injunction will issue at the instance of the party injured.

ACTION to enjoin defendant from polluting a stream of water flowing through plaintiff's land, and to recover damages. Plaintiff recovered twelve hundred dollars damages, and an injunction was ordered to issue to restrain the continuance of the wrong complained of. The general term affirmed the judgment.

Charles B. Ernst, for the appellant.

J. A. Stull, for the respondent.

DANFORTH, J. The plaintiff was the owner and occupant of certain premises, containing more than four acres of land, in the town of Brighton, adjoining the city of Rochester, and watered by a stream known as "Thomas Creek," which, rising in that city and fed by springs of pure water, ran northwardly and across the plaintiff's premises into Irondequoit Bay. He collected its water into an artificial basin, making it serve as well for domestic uses as the propagation of fish, and from it, in due season, he also procured a supply of ice.

The defendant thereafter constructed sewers, and through them discharged, not only surface water, but the "sewerage from houses and the contents of a large number of water-closets" into Thomas Creek, above the plaintiff's land, with such effect as to render its water unfit for use, and cover its banks with filthy and unwholesome sediment. These and other facts well warranted the conclusion of the trial court that the act of the defendant in thus emptying its sewers constituted an offensive and dangerous nuisance.

Moreover, the plaintiff is found to have sustained a special injury to his health and property from the same cause, and we find no reason to doubt that he is entitled, not only to com-

pensation for damages thereby occasioned, but also to such a judgment as will prevent the further perpetration of the wrong complained of: *Goldsmid v. Commissioners*, 1 Eq. Cas. 161; 1 Ch. App. Cas. 348.

In view of the principle upon which these and like decisions turn, the objections of the learned counsel for the defendant against the judgment appealed from are quite unimportant. The filth of the city does not flow naturally to the lands of the plaintiff, as surface water finds its level, but is carried thither by artificial arrangements prepared by the city, and for which it is responsible. Nor is the plaintiff estopped by acquiescence in the proceedings of the city in devising and carrying out its system of sewerage. The principle invoked by the appellant has no application. It does not appear that the plaintiff in any way encouraged the adoption of that system, or by any act or word induced the city authorities to so direct the sewers that the flow from them should reach his premises. There is no finding to that effect, and the record contains no evidence. In fine, the case comes within the general rule which gives to a person injured by the pollution of air or water, to the use of which, in its natural condition, he is entitled, an action against the party, whether it be a natural person or a corporation who causes that pollution.

The judgment appealed from should therefore be affirmed, with costs, but without prejudice to an application by the defendant to the supreme court for such further stay of the issuing of the injunction awarded by it as may, under the circumstances of the case, seem to that court proper.

INJUNCTIONS AGAINST NUIRANCES GENERALLY: See note to *Ryan v. Copes*, 73 Am. Dec. 113-116. That a court of equity will enjoin nuisance, whether public or private, is well established: *Dumesnil v. Dupont*, 18 B. Mon. 800; 68 Am. Dec. 750; *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654. Foul-ing stream is proper ground for interference by injunction: *Lockwood v. Lawrence*, 77 Me. 297; 52 Am. Rep. 763; *Clark v. Lawrence*, 6 Jones Eq. 83; 78 Am. Dec. 241. And so is pollution of the air: *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654.

ESTOPPEL TO OBJECT TO NUIRANCE BY REASON OF ACQUIESCENCE OR LACHES: See the note to *Logansport v. Uhl*, 50 Am. Rep. 117-119.

AVERY v. EVERETT.

[110 NEW YORK, 317.]

WILL, CONSTRUCTION OF.—A devise to testator's wife "as long as she shall remain unmarried and my widow, but on her decease or marriage, then what may remain I give and devise to my son, C. H. In case my son, C. H., should die without children, then, after my wife's death and my son's death, to A. S., my brother's son," gives to C. H., on the testator's decease, a vested remainder in fee, limited upon the life estate of his mother, subject to be defeated by his death without children, in which event the remainder vests in the testator's nephew, A. S.

SENTENCE PRONOUNCED FOR A CAPITAL OFFENSE PLACED the offender in a state of attainder at the common law.

PRINCIPAL INCIDENTS CONSEQUENT UPON AN ATTAINDER AT COMMON LAW were forfeiture, corruption of blood, and an extinction of civil rights, more or less complete, which was denominated civil death.

INCIDENT OF CIVIL DEATH attended every attainder of treason or felony at the common law; and the person attainted became disqualified from being a witness, from bringing an action, and from performing any legal function.

ATTAINTED PERSON WAS NOT DIVESTED OF HIS LANDS UNTIL OFFICE FOUND; he could devise them, subject only to the right of entry for the forfeiture, and could be either a grantor or grantee, and the grant would be good against all persons other than the king. His body could be taken in execution, subject to the paramount claims of public justice. He could be sued, but could not sue; he could contract, but could not require the courts to aid him in enforcing his contracts.

CIVIL DEATH DID NOT OF ITSELF DIVEST THE OFFENDER OF HIS LANDS, as a general rule.

CIVIL DEATH, RESULTING FROM ENTERING INTO RELIGION AND BECOMING A PROFESSED MONK, differed from civil death occasioned by a sentence for crime, in this, that in the former case the monk renounced all secular concerns, and held himself freed from the obligations resting upon him as a member of civil society. He was therefore treated as dead in fact, and as having surrendered all his civil rights.

CONSEQUENCES OF CIVIL DEATH, UNDER THE STATUTES OF NEW YORK, are no greater than at common law, and do not include the divesting of the estate of the criminal. Hence if lands devised to him were, on his dying without issue, to vest in another, they do not so vest on his civil death.

EJECTMENT. Both parties claimed under the will of John H. Southwick, the provisions of which are stated in the first point of the *syllabus*. Plaintiff claimed under Augustus Southwick, who, by the terms of the will, became entitled to the premises only in the event of Charles H. Southwick dying without children. The trial court gave judgment for plaintiff, which was reversed by the general term.

Rhodes, Coon, and Higgins, for the appellant.

William Tiffany, for the respondent.

ANDREWS, J. We concur in the conclusion of the courts below, that, by the true construction of the will of John H. Southwick, his son, Charles H. Southwick, took, upon the testator's death, a vested remainder in fee, limited upon the life estate of his mother in the premises in question, subject, however, to be defeated by a condition subsequent, viz., his death without children, in which event, the substituted remainder given in that contingency to Augustus Southwick, the son of the testator's brother Nathan, would vest in possession, thereby displacing the prior fee given to the testator's son Charles: *Vanderzies v. Slingerland*, 103 N. Y. 47; 57 Am. Rep. 701; *In re New York etc. R. R. Co.*, 105 N. Y. 89; 59 Am. Rep. 478. The plaintiff claims under the devise to Augustus Southwick. The widow of the testator died September 1, 1869, after the death of her husband. Charles H. Southwick is still living, unmarried, and without children. If nothing further appeared, the plaintiff's action would necessarily fail, for the reason that the contingency had not happened upon which the estate of Augustus Southwick is limited, and the defendant, George Everett, who is the lessee of Charles H. Southwick, would be entitled to judgment. The plaintiff, to obviate this apparent difficulty, proved that Charles H. Southwick, in October, 1875, was convicted of the crime of murder in the second degree, and was thereupon sentenced to imprisonment in the state prison at Auburn for the term of his natural life, and from that time has been imprisoned pursuant to such sentence. The plaintiff contends that, as the life estate of the widow was terminated by her death, and as Charles H., on his sentence to imprisonment for life, became civilly dead, the contingent estate given by the will to Augustus Southwick, in case "Charles H. should die without children," his became an actual fee.

Assuming that a civil death consequent upon a sentence to imprisonment for life operates *eo instanti* to divest the person sentenced of his estate,—a point we shall hereafter consider,—there is still another question, viz., whether such a death was contemplated by the testator, and whether the words of limitation to Augustus Southwick are to be construed as applying to a civil or only to the natural death of Charles H. Southwick. It is possible that Charles H. may be pardoned, and may marry and have children. It is plain that Augustus Southwick can take only according to the will, and that if, by its true construction, the natural death of Charles H., without

children, was solely the contingency upon which the substituted fee is to vest, the plaintiff must fail on this ground, independently of any other, and whatever conclusion might be reached as to the effect of the civil death of Charles H. upon his own estate under the will. It is said by Coke (Co. Lit., sec. 200), speaking of the two species of death, *mors civilis* and *mors naturalis*, that to "oust all scruples, leases for life are ever made during the natural life," etc. We have found no authority upon the construction of the word "death" in a will as applied to circumstances like these in the present case. We deem it unnecessary to decide the point suggested, as we are of opinion that the title of Charles H. Southwick to his land was not divested as a consequence of his sentence to imprisonment for life; and it follows as a necessary consequence that Augustus Southwick, or his grantee, has no present vested interest upon which to maintain ejectment.

The Revised Statutes declare that a person sentenced to imprisonment for life "shall thereafter be deemed civilly dead": 2 R. S. 701, sec. 20. This provision was re-enacted in the Penal Code, section 708. The only statutory provision on this subject existing in this state prior to the Revised Statutes is found in an act passed March 29, 1799, which enacted that in all cases where a person shall be convicted and attainted of any felony thereafter committed and adjudged to imprisonment for life in the state prison, "such person shall be deemed and taken to be civilly dead to all intents and purposes in the law," and the statute of 1799 remained unchanged until the provision in the Revised Statutes to which we have referred was substituted: 1 Rev. Laws 1813, 411. In the absence of any legislation on the subject, the common-law consequences of a conviction for felony attached in this state and remained until abrogated or changed by constitution or statute: 2 Kent's Com. 386. By the common law the civil death of the offender was one of the consequences of attainder for treason or felony; and in *Troup v. Wood*, 4 Johns. Ch. 248, the chancellor seemed to entertain no doubt that, on a conviction in this state, prior to 1799, of an offense which was a felony at common law, the common-law incident of civil death attached, and this as well where the statute had changed the punishment from death to imprisonment for life, as in the case of a capital sentence. To ascertain the meaning of the phrase "civil death," as used in the Revised Statutes, and whether the statute, on a sentence of an offender to imprisonment for life, operates *eo instanti* to

divest him of his estate, it is important to consider how civil death affected rights of property at common law. By the ancient common law, when sentence was pronounced for a capital offense, the offender, by operation of law, was placed in a state of attainder: 1 Chitty on Criminal Law, 723. There were three principal incidents consequent upon an attainder for treason or felony, viz., forfeiture, corruption of blood, and an extinction of civil rights, more or less complete, which was denominated civil death. Forfeiture was a part of the punishment of the crime, and was of Saxon origin, by which the goods and chattels, lands and tenements of the attainted felon were forfeited to the king, the former absolutely on conviction, and the latter perpetually, or during the life of the offender, on sentence being pronounced. The doctrine of corruption of blood was of feudal origin, introduced after the Norman Conquest. The blood of the attainted person was deemed to be corrupted, so that neither could he transmit his estate to his heirs, nor could they take by descent from the ancestor. The crime of the attainted felon was deemed a breach of the implied condition in the donation of the feud, *dum bene se gesseret*, and the descent to his heirs being interrupted by the corruption of blood, his lands escheated to the lord. But this escheat was subordinate to the prior and superior law of forfeiture: Comyn's Digest, tit. Forfeiture, K; 2 Bla. Com. 252; 1 Chitty on Criminal Law, 723-728; Broom and Hadley's Commentaries, 404; 1 Salk. 85. The incident of civil death attended every attainder of treason or felony, whereby, in the language of Lord Coke, the attainted person "is disabled to bring any action, for he is *extra legem positus*, and is accounted in law *civiliter mortuus*" (Co. Lit., sec. 199, note), or, as stated by Chitty (1 Criminal Law, 724), "he is disqualified from being a witness, can bring no action, nor perform any legal function,—he is, in short, regarded as dead in law." The forfeiture of the estate of the attainted felon to the king or to the lord was not a consequence of the situation in which he was placed of *civiliter mortuus*, but proceeded upon distinct and independent reasons, and this, we think, is rendered plain when we consider how the law of forfeiture was construed. The attainted person was not divested of his lands till office found. This is very distinctly held in *Nichols v. Nichols* Plowd. 486, where the question was put, "If the possession, in deed or law, of the lands of a person attainted of treason, should no be in the king before office found, in whom should

it be by the course of the common law in the life of the person attainted?" And it was held that the freehold of such lands would be, in fact, in the person attainted, so long as he should live; "for, as he hath capacity to take in deed lands by a new purchase, so hath he power to retain his ancient possessions, and he shall be tenant to every *præcipe*." See also Vin. Abr., tit. Forfeiture, 9.

So, also, the better opinion is, that he could devise his lands, subject only to the right of entry for the forfeiture. In Bacon's Abridgement, title Wills and Testament, B, it is said that "however the wills of traitors, aliens, felons, and outlawed persons are void as to the king or lord that has the right to the lands or goods by forfeiture, yet the will is good against the testator himself and all others but such person only." See also Vin. Abr., tit. Attainder; 1 Jarman on Wills, Bigelow's 5th ed., 42. An attainted person could also demise his lands before office found. This was expressly held in *Doe v. Pritchard*, 5 Barn. & Ad. 765, citing a passage from Perkins, "that a man attainted of felony or murder may make a grant of a rent, or common, or a feoffment, and the same shall bind all persons but the king and the lord of whom the land is holden." So a person attainted could take lands by devise or purchase. He could be grantor or grantee after attainder, and the grant would be good as against all persons, except the king: Vin. Abr., tit. Attainder; Shep. Touch. 231; Perkins, 26, 48. He could not sue, but could be sued: Vin. Abr., *supra*; and his body could be taken in execution, subject, however, to the paramount claims of public justice: 1 Chitty on Criminal Law, 725; *Davis v. Duffie*, 1 Abb. App. 489. He could make no contract which he could enforce. In *Kynnauld v. Leslie*, L. R. 1 Com. P. 389, it was said by Willes, J.: "Moreover, an attainted person is not incapable of contracting, though he cannot pray in aid of the king's court to enforce his contracts. He can contract with those whose consciences bind them to fulfill their engagements, and he can take a grant, or grant to others, even the inheritance which, on office found, would escheat to the crown; and the rights so acquired by third parties may be the subject of an action in her Majesty's courts, and his contracts may be enforced against him." In the case last cited it was held that when one attainted of treason escaped to a foreign country, and there married and had children, and was afterwards executed on the same attainder, the marriage was valid and the chil-

dren legitimate, and that they could inherit from each other, since they were not compelled to trace the inheritance through the ancestor. It seems to be a necessary conclusion, from the rules of the common law governing rights of property as affected by forfeiture for crime, that civil death, one of the consequences of conviction for treason or felony, did not of itself, as a general rule at least, operate to divest the offender of his title to his lands. This would be inconsistent with the settled doctrine that an attainted person retained his title and possession till office found, and that meanwhile he could make a grant or demise good except as against the king. If civil death worked of itself a divestiture of his estate, either no entry would be necessary to complete the title of the crown by forfeiture, or the alternative result would follow,—that the title would be in abeyance from the time of the attainder until entry by the king or lord, for the heir could not take by reason of corruption of blood, and the felon's title would be gone by his civil death. But we have not been able to find any case showing that, as a general rule, civil death modified in any respect the law of forfeiture, or deprived the attainted person of his lands before the forfeiture was enforced by entry. The appellant, to sustain his contention that, by the common law, civil death, consequent upon attainder, operated *eo instanti* to divest the title of the offender to his lands, relies upon the text of Littleton (section 200), and the commentaries of Lord Coke. Littleton, in the section cited, speaking of the classes of persons who cannot maintain an action, mentions as the fifth class persons who have entered into religion and become monks professed. Such a person, he says, "is dead in the law, and his *sonne* or next cousin incontinent shall inherit him as well as though he were dead indeed. And when he entereth into religion he may make his testament and his executors; and they may have an action of debt due to him before his entry into religion, or any other action that executors may have, as if he were dead indeed; and if he make no executors when he entereth into religion, then the ordinary may commit the administration of his goods to others, as if he were dead indeed."

The doctrine that persons entering into religion and becoming monks professed were civilly dead proceeded on the ground that as they thereby renounced all secular concerns, and held themselves freed from the obligations resting upon other members of civil society, they should be treated as though they

were dead in fact, and as having surrendered all their civil rights: 1 Bla. Com. 132. Coke, in commenting on the passage from Littleton above quoted, says: "And here it is to be observed that an abjuration, that is, a deportation forever into a *forreins* land like to profession (whereof our author speaketh here), is a civil death, and that is the reason that the wife may bring an action, etc. And so it is if, by an act of Parliament, the husband be attainted of treason or felony, and, saving his life, is banished, this is a civil death, and the wife may sue as a *feme sole*." It will be observed that Coke adds two instances of civil death to the one mentioned by Littleton, namely, abjuration and banishment, on attainder by act of Parliament. But in his note to section 199, already quoted, he declares that every person attainted of high treason, petit treason, or felony is accounted in law *civilliter mortuus*. The fair conclusion, from a comparison of these passages, is, that the strict civil death mentioned by Littleton in the case of a monk professed, which was followed by an extinction of civil rights, including the right of property, was confined to monks and the two other cases mentioned by Coke. This seems to have been the interpretation of Blackstone, who, in the enumeration of the causes of civil death, in which the next heir inherits the estate as though the ancestor was absolutely dead, mentions the three cases of profession, abjuration, and banishment, and no others: 1 Bla. Com. 132. In case of profession, the civil death was not a consequence of crime. Abjuration, which was connected with the law of sanctuary, was a method by which a criminal escaped punishment on condition of taking an oath of abjuration, and leaving the realm forever. Banishment on attainder by act of Parliament was a power only exerted in rare instances. Both sanctuary and abjuration were abolished by statute 21 Jac. I., c. 28. The statute 54 Geo. III., c. 45, abolished forfeiture of lands, and corruption of blood in every case except treason, petit treason, and murder. "So that," as said by Chitty, writing soon after the passage of that statute, "at the present day on attainder of ordinary felony the criminal forfeits only his goods and chattels, and the profits of land during life, while his real estate comes in the ordinary channels to his heir, who is thus restored to the full capacity to inherit": 1 Chitty on Criminal Law, 735. Still latter, the statute 33 & 34 Vict., c. 23, swept away the whole doctrine of attainder, corruption of blood, and forfeiture, except forfeiture consequent on outlawry, and the

same statute provided for the administration of the estate of the convicted felon by trustees for the benefit of his creditors and the support of his family. Under this statute, the real property of a traitor or felon remains his own, subject to the temporary estate of the trustees, and he may dispose of it by his will, but by the statute he is incapable of alienating or charging his property, or of making any contract: 1 Jarman on Wills, Bigelow's 5th ed., 44. It is a suggestive fact bearing upon the point we are considering, that no case is to be found, either before or after the statute of 54 George III., in which it has been held that a conviction of felony cast the descent of the felon's land upon his heirs, as though he was dead in fact. And since the statutes 83 and 84 Victoria, it is certain that such a doctrine has been unknown to the law of England. That statute assumed that the title of the felon to his lands was not divested by his conviction.

It remains to consider how the question stands in the light of our own statutes and decisions. The cases on the subject are few, but there are two which deserve especial attention: *Troup v. Wood*, 4 Johns. Ch. 248, and *Platner v. Sherwood*, 6 Id. 118, decided in 1820 and 1822. Both related to lands which had been owned by one Platner, who, in June, 1799, was convicted of forgery, and sentenced to the state prison for life. He was pardoned in 1806. The trial and conviction was after the passage of the act of March 29, 1799, but the offense was committed prior thereto. In *Troup v. Wood*, *supra*, the bill was filed by a grantee of Platner under a deed executed before his conviction, in 1792, to set aside sales of the same lands, made after Platner's conviction and sentence, and during his imprisonment under judgments against him, obtained prior to the complainant's deed. The chancellor rendered a decree setting aside the sales and titles acquired by the defendants, under the executions, upon several grounds, one of which was that the judgment upon which the execution issued had been fully paid prior to the sales thereon, and that the sales were fraudulently made by the act and procurement of the defendants. The chancellor, in his opinion, after stating this conclusive ground of judgment, proceeded further to say that the sales were also void for another reason, viz., that the *scire facias* to revive the judgment against Platner was directed to him, whereas, as by his conviction and sentence to imprisonment for life he became civilly dead, it should have been directed "to his representatives and to the terre-tenants." This

plainly implied that the chancellor then entertained the opinion that a civil death, consequent upon a conviction of felony, divested the offender's estate, and the heirs immediately inherited, as in case of actual death, forfeiture and corruption of blood having been previously abolished in this state, except forfeiture for a limited time in case of treason. The subsequent case of *Platner v. Sherwood, supra*, was brought by Platner, after his pardon, to set aside sales of other lands made during his imprisonment, under the same judgments and executions as in the former case, the title to such lands having been in him at the time of his conviction and sentence. The defendant demurred to the bill, on the ground that the plaintiff was divested of his estate in the lands by his conviction and imprisonment, and that his heirs were the parties in interest. It is plain that the demurrer was good, provided the chancellor was correct in his opinion in the former case as to the effect of civil death at common law in divesting the estate of a convicted felon. But the chancellor, on reconsideration, reversed his previous ruling on this point, and held that at common law that consequence did not follow the situation of *civilliter mortuus*, except in the special cases to which we have referred. He therefore sustained the bill, suggesting, as a reason for his misapprehension in the former case, that the statute of March 29, 1799, which was in force when the trial and conviction took place, and when the former decision was made, only applied to offenses thereafter committed. This suggestion in turn implied, although the question was not involved in the case, that the statute of 1799, declaring that a person adjudged to imprisonment for life on a conviction of felony "shall be deemed and taken to be civilly dead to all intents and purposes in the law," extended the common-law consequences of civil death, and made the estate of the convicted felon descendible immediately to his heirs. The case of *In re Deming*, 10 Johns. 232, presented the question of the effect of a pardon of a person convicted of a felony, and sentenced to imprisonment for life, upon his right to the guardianship of his infant child, after his release from imprisonment. It was held that the pardon restored him to the relation of a father, but it was assumed in the brief *per curiam* opinion in the case that any rights of property in the convict were divested by the conviction and sentence. This case arose when the act of 1799 was in force. The case of *Platner v. Sherwood, supra*, was a direct adjudication that, by the general rule of the com-

mon law, civil death did not operate as a divestiture of the estate of the convicted felon. The language of the act of 1799, that a person sentenced to imprisonment for life was to be deemed civilly dead, "to all intents and purposes in the law," was very special and comprehensive, and it is not necessary to disagree with the intimation of the chancellor that it extended the consequences of civil death beyond what was understood at common law. However this may be, when the language of the act of 1799 was changed by the Revised Statutes, by omitting the special and peculiar words therein, and the language was substituted that a person sentenced to imprisonment for life should thereafter "be deemed civilly dead," the provision became, we think, simply declaratory of the common law.

On looking at the statutes regulating the transfer and devolution of property upon the death of the owner, it will be found that their natural import confines the meaning to a natural death. By the former statute of wills it is declared that "all persons, except idiots, persons of unsound mind, married women, and infants, may devise their real estate," etc., and, as to personal property, that "every male person of the age of eighteen years, and every person not being a married woman," may dispose of it by will: 2 R. S. 60, sec. 21; and provisions are made for the probate of wills after the death of the testator. The statute of administrations authorizes the granting of letters of administration of the goods, chattels, and credits of persons "dying intestate": 2 Id. 73, sec. 23. The statute regulating proceedings to discover the death of persons upon whose lives any particular estate may depend requires that the petitioner shall state in his petition "that he has cause to believe, and does believe, that the person upon whose life such prior estate depends is dead," etc.: 2 Id. 343, sec. 2. An assignment of dower can be claimed only on the death of the husband: 1 Id. 740, secs. 1 et seq. In none of these statutes is there any intimation that a civil as distinguished from a natural death was in the contemplation of the legislature. The only statute we have found which permits an inference that civil death, consequent upon imprisonment for life, operates to divest the convict of his estate, is a provision in the act relating to "absconding, concealed, and non-resident debtors," which permits the proceedings authorized thereby to be taken "whenever any debtor shall be imprisoned in the state prison for a term less than his natural

life": 2 R. S. 15, sec. 1; making no provision and giving no remedy under that act against the property of one imprisoned on a life sentence. This provision was incorporated into the Revised Statutes from the "Act for relief against absent and absconding debtors, passed March 21, 1801, when the act of March 29, 1799, declaring the effect of a sentence to imprisonment for life, was in force. The most that can be said as to the effect of this section of the absconding-debtor act, as bearing upon the point now in controversy, is, that the legislature may have assumed that civil death, resulting from a sentence to imprisonment for life, operated to divest the offender of his estate. But when it is considered that no case in this state can be found where the will of a person imprisoned on a life sentence has been admitted to probate during his natural life, or where administration has been granted on his estate or dower assigned as if he was dead, nor any case where the title to property has been traced through a civil as distinct from a natural death, the inference seems almost irresistible that the doctrine that civil death, consequent upon a life sentence, divests the criminal of his estate, has no foundation in our law. As to right of administration, see *Frazer v. Fulcher*, 17 Ohio, 260. The disabilities flowing from the situation of *civiliter mortuus* have a wide scope, without including this incident. The statute, without expressly declaring this result, assumes that a life sentence of the husband, *ipso facto*, dissolves his marriage: 2 R. S. 687, sec. 9, subd. 6. The convict cannot sue, although he may be sued, and his property is answerable to his creditors. But he may defend an action brought against him: Code, sec. 181; *Davis v. Duffie*, 1 Abb. App. 489; *Bowles v. Haberman*, 95 N. Y. 246. He cannot enter into executory contracts and call in aid the courts to enforce them, but he may transfer his property by will or deed: See *Rankin's Heirs v. Rankin's Ex'rs*, 6 T. B. Mon. 531; 17 Am. Dec. 161, and authorities *supra*. His political rights are taken from him, his wife and children owe him no fealty or obedience. It is easy to suggest possible difficulties in the administration and protection of the property of a convict sentenced to imprisonment for life. These are matters which may be the appropriate subject of legislation. They have been met in England by the statute 33 and 34 Victoria, by which a trustee is appointed to administer the convict's estate for the protection of all interests. Most of the difficulties suggested exist in the same degree in the case of convicts sen-

tenced to imprisonment for a term of years, during which time their civil rights, by force of a prior section of the statute (section 19), are suspended. But it is not claimed that this consequence divests them of their property during their imprisonment.

We here conclude our examination of the interesting question presented by this record. Any one who takes the pains to explore the ancient and in many respects obsolete learning connected with the doctrine of civil death in consequence of crime, will find that he has to grope his way along paths marked by obscure, flickering, and sometimes misleading lights, and he cannot feel sure that at some point in his course he has not missed the true road. But there is a guiding principle which in the present case greatly aids in solving the question presented, and that is, that no one can or ought to be divested of his property *in invitum*, except by the clear warrant of law, and this, we think, is not found in the statute relating to civil death. The weighty words of Chancellor Kent in *Platner v. Sherwood*, 6 Johns. Ch. 118, may appropriately conclude this opinion: "The penal consequences of attainder must be necessary deductions severely required by the premises; and as there was to be no forfeiture of the estate, the law would not be consistent with itself if it held the party alive for the purpose of being sued and charged in execution, and yet dead for the purpose of transmitting his estate to his heirs."

We think the order of general term should be affirmed, and judgment absolute entered for the defendant on the stipulation.

KARL, J. dissented on the ground that the statute of March 29, 1799, declaring that life convicts should be "deemed and taken to be civilly dead to all intents and purposes in law," was passed for the purpose of depriving the convict of all civil rights whatsoever; and that the phraseology of the Revised Statutes, that such persons "shall thereafter be deemed civilly dead," was not designed to change the scope and meaning of the previous statute. "The rule was simply expressed in more concise and appropriate language."

CIVIL DEATH, AND THE EXTENT TO WHICH IT IS RECOGNIZED IN AMERICA.—The scope of this question, while broad enough in its possibilities, is nevertheless somewhat limited as determined by the adjudicated cases in this country. It is true that there are English cases which enunciate certain principles as governing the law relating to civil death. How far those principles are applicable in this country depends necessarily upon the extent to which the law of England, as declared by those decisions, is here in force. The strictness of the early English law was greatly modified, and many disabilities which had formerly existed were abolished by statute as civil-

zation advanced, and men's ideas in consequence broadened: 1 Bla. Com. 132; 2 Kent's Com. 386, 387; 7 Anne, c. 22; 17 Geo. II., c. 29; 54 Geo. III., c. 145; 21 Jac. I., c. 23; 3 & 4 Wm. IV., c. 106; 33 & 34 Vict., c. 23. While the rules of the common law in force in England at the time of our severance from the mother country are in force here, yet they are only in force in so far as they are applicable to our institutions, tenures, and form of government: *Wilbur v. Tobey*, 16 Pick. 177. And the maxim that all lands were granted originally out of the sovereign, and were holden mediately or immediately of the crown (2 Bla. Com. 53), is the foundation-stone on which the law of escheats and forfeiture was erected; but these, as is said in the principal case, were only incidents of attainder for treason or felony, another incident of such attainder being civil death. Thus "civil death commenced if any man was banished or abjured the realm by the process of the common law, or entered into religion, — that is, went into a monastery, and became there a monk professed, — in which cases he was absolutely dead in law, and such heir should have his estate": 1 Cooley's Bla. Com. 132. So, also, if a man was attainted of treason or felony, and banished forever, or left the kingdom upon a conditional pardon after judgment of death: 1 Id., note 12; 1 Abbott's Law Dict., tit. Civil Death. It is said in 2 Kent's Com., 6th ed., 386, that "forfeiture of property, in cases of treason and felony, was a part of the common law, and must exist at this day in the jurisprudence of those states where it has not been abolished by their constitutions or by statute." But the court in *Fraser v. Fulcher*, 17 Ohio, 260, argues as follows: "It is said that, by the rules of the common law, there is such a thing as a civil death as well as a natural death. We know that in England there are cases in which a man, although in full life, is said to be civilly dead; but I have not learned, until this case was brought before us, that there was but one kind of death known to our laws. In New York they have a statute which provides that when a man is, for the punishment of crime, sentenced to imprisonment in the penitentiary for life, he shall be considered as civilly dead to all intents and purposes in law. In the case of *Troup v. Wood*, 4 Johns. Ch. 247, Chancellor Kent says that he apprehends that this law, which was passed March, 1799, was only declaratory of the existing law. This opinion is based on the pre-existing statutes of the state, and upon the common law of England, which, by statute, was part of the law of New York. In the subsequent case of *Platner v. Sherwood*, 6 Id. 118, the chancellor says he was mistaken in the opinion expressed in the case just cited; that the act of 1799 was only declaratory of the existing law. And in the latter case he decides that although a man might be sentenced to imprisonment for life in punishment for crime, still he would not be held to be civilly dead unless the crime was committed after the law of 1799 took effect. If, then, we rely upon the authority of Chancellor Kent, there is no principle of the common law by which a man (imprisoned for life) would be held to be civilly dead. . . . It has been suggested, however, that for the legislature to enact that the estate of a person in such situation should be disposed of as if he were dead would be a violation of that clause of the constitution which declares that 'no conviction shall work corruption of blood or forfeiture of estate.' Whether it be so or not depends upon the meaning which we attach to the word 'forfeiture,' as used in this connection. To me it seems clear that the intention of the convention in the introduction of this clause was to guard against evils existing in the country from which many of our laws are derived. In England, the conviction of many offenses works 'corruption of blood and forfeiture of estate.' The forfeiture is to the king. The blood is corrupted.

The attainted person can neither inherit from his ancestors, nor can he transmit inheritance. His property is not given to his heirs, but by the forfeiture is taken from them. . . . It was against such a state of things that the convention intended to provide."

Again, under the English law, escheat had a wider meaning than it has under our laws, since there, in addition to the tenant's dying without heirs, if his "blood was corrupted and stained by the commission of treason or felony," he forfeited his feud: 2 Bla. Com. 72, 245; and in the American states, escheat means the reversion to the state when the title to land fails for lack of heirs or devisees, or where the tenant is an alien: *Hughes v. State*, 41 Tex. 10, 17; 3 Washburn on Real Property, 443. So forfeiture was a part of the punishment for the offense, and "does not relate to the feudal system"; and escheat was a fruit and consequence of the doctrine of tenures. "Escheat operates in subordination to this more ancient and superior law of forfeiture": 2 Bla. Com. 251, 252. There was also a difference between forfeiture of lands and of goods and chattels, lands being forfeited on attainder, and not before, and chattels were forfeited on conviction: 4 Comyn's Digest, 413, note a, 1. It is provided by the laws of the United States that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted: *Desty's Federal Constitution*, 2d ed., 229; 2 Kent's Com., 6th ed., 386; *Desty's American Criminal Law*, sec. 68; see, as to the present law in England, *Stats. 3 & 4 Wm. IV., c. 106*; 54 Geo. III., c. 145. So "several of the state constitutions have provided that no attainder of treason or felony shall work corruption of blood or forfeiture of estate except during the life of the offender, and some of them have taken away the power of forfeiture absolutely, without any such exception": 2 Kent's Com., 6th ed., 386. Nor is heritable blood corrupted by an act of one coming within the provisions of the confiscation act of Congress of July 17, 1862: *Bigelow v. Forrest*, 9 Wall. 339, 352. So it is said in *Desty's Federal Constitution*, 2d ed., 229, that "the confiscation act provided against any forfeiture of real estate beyond the life of the offender. All that can be sold under the confiscation act is the right to the property terminating with the life of the person for whose offense it had been seized. Only the life estate is subject to condemnation and sale." Again, "persons attainted of high treason were formerly incompetent to devise their lands, since by several old statutes the real estates of a traitor were by the attainder *ipso facto* vested in the crown. The lands of all persons attainted for petit treason and felony formerly escheated to the king or other feudal lord by reason of the corruption of blood consequent on attainder, which of course prevented the descent to the heir, and the devisees of such persons were absolutely void or voidable, as in the case of an alien," until 1870. So "treason and felony incapacitated persons from making a will of personal estate which became forfeited to the crown on conviction"; and such was the case until the act of 33 & 34 Vict., c. 23, under which the convict or felon was only temporarily deprived of his real and personal estate, since an administrator might be appointed who held the property in trust only, and the convict might dispose of the same by will: 1 Jarman on Wills, 5th ed., 42 et seq. In California it is held that "the forfeitures and disabilities imposed by the common law upon persons attainted of felony are unknown to the laws of that state," and that no consequences follow, except those declared by statute; but "if the convict be sentenced for life, he becomes *civiliiter mortuus*, or dead in law in respect to his estate, as if he was dead in fact." This is statutory, however, and if the sentence be "for a term less than life, his civil rights are only suspended during the

term, and he forfeits only all public offices and private trusts, authority, and power": *Matter of Estate of Nerac*, 35 Cal. 392, 396; 95 Am. Dec. 111. As to the time when a person *civiliiter mortuus* became divested of title, it is said that "by the civil law, as well as by the common law, the king cannot take upon himself the possession of an estate said to have escheated until the fact is judicially ascertained by a proceeding in the nature of an inquest of office": *People v. Folsom*, 5 Cal. 374, 379. So an alien may hold against every one, and even against the government, until office found: *Id.* "These inquests of office were devised by law as an authentic means to give the king his right by solemn matter of record, without which he, in general, can neither take nor part from anything": 3 Bla. Com. 259. One exception, however, existed in cases of attainder for high treason where an inquisition of office was unnecessary, the forfeiture resulting instantly: *Id.* In support of these propositions, see *Fairfax v. Hunter*, 7 Cranch, 603; *Craig v. Radford*, 3 Wheat. 594; *Jones v. McMasters*, 20 How. 8; *Bigelow v. Forrest*, 9 Wall. 339, 352, 353; *Wilber v. Tobey*, 16 Pick. 177; *Jackson v. Adams*, 7 Wend. 367; *State ex rel. Attorney-General v. Tilghman*, 14 Iowa, 474; *Commonwealth v. Hite*, 6 Leigh, 588; 29 Am. Dec. 236, and note 232; *Barbour v. Nelson*, 1 Litt. 60; *Bradstreet v. Supervisors etc.*, 12 Wend. 546; *contra*, *In re Malow's Estate*, 21 S. C. 435, 446, 447; *Roid v. State*, 74 Ind. 252; *Heirs of Holliman v. Peebles*, 1 Tex. 673; *Rubeck v. Gardner*, 7 Watta, 455; *White v. White*, 2 Met. (Ky.) 185; *Colgan v. McKeon*, 24 N. J. L. 566; *O'Hanlin v. Den*, 20 Id. 31; *Crams v. Reader*, 21 Mich. 24; 4 Am. Rep. 430; *Farrar v. Dean*, 24 Mo. 16; *Puckett v. State*, 1 Sneed, 355; *Kennedy v. Strong*, 14 John. 123, 129; *Fontaine v. Phoenix Ins. Co.*, 11 Id. 293. So by the common law it has been held that the forfeiture for treason or felony by verdict or confession relates back to the time of the fact, to avoid all alienations afterwards: Co. Lit. 390 b; *Jackson v. Prescott*, 2 Caines, 164; but there were exceptions, however, to this rule: Hale P. C. 264, 270; 4 Bla. Com. 332; Co. Lit. 13.

So far we have considered the fundamental law of England applicable to civil death, the principles governing the decisions in that country, their analogy to the laws of this country, also the time when the property is divested out of the person *civiliiter mortuus* in England and in this country, the cases here being principally those of escheats. In applying the principles underlying the reasoning of the English cases, the courts have held that "a man attainted of felony or murder, etc., may make a grant of a rent or common, or a feoffment, etc., and the same shall bind all persons but the king (for his time) and the lord of whom the land is holden": Denman, C. J., in *Doe dem. Griffith v. Pritchard*, 5 Barn. & Ad. 765, 781, 2 Nev. & M. 489, decided as late as 1833, and the same judge adds that the passage in Coke on Littleton, 42 b, is consistent with this ruling, although seemingly *contra*. So an attainted person might be charged in a civil action, and would not be discharged on motion, but would be bound to answer: *Ramsey v. McDonald*, 1 W. Black. 30; though it is decided in *Bonnell v. Rome etc. R. R. Co.*, 12 Hun, 218, that while such convict is deprived of his rights as a plaintiff, yet he is not relieved from liability as a defendant. So a wife was entitled to dower in case of a civil as well as a natural death: *Marsh v. Hutchinson*, 2 Bos. & P. 226, 231; but this is *contra* to the law as declared by Sir Edward Coke in 1 Inst. 33 b, where it is stated that dower only arises on the natural death, not the civil death, of the husband, though the case of *Marsh v. Hutchinson*, *supra*, follows Bracton, lib. 4, tract 6, c. 7, fol. 301 b; Britton, cap. 106, fol. 251; and the old books, Perkins, sec. 307, and Gilbert on Dower in Uses, 401, support certainly in part the law as declared by Coke, *supra*. It is also said in Washburn on Real Property, 5th ed., 252, that "by the common law the

widow of a convicted traitor could not recover dower. But it is believed that no such principle was ever introduced into the laws of this country." The fiction of law which supposes a husband as civilly dead permitted the wife to be sued for assault in her own name in such case: *Marsh v. Hutchinson*, 2 Bos. & P. 226, 232. So a woman whose husband had been banished by act of Parliament has been declared capable of making a will under the common law: *Portland v. Progers*, 2 Vern. 104; and see *Cutter v. Butler*, 25 N. H. 343; 57 Am. Dec. 360. In *Cornwall v. Hoyt*, 7 Conn. 420, the wife was permitted to sue as a *feme sole* upon a writing given her to secure her the payment of a sum of money, her husband, a citizen of Connecticut, having abandoned his country and joined with its enemies *bello flagrante*. The court said: "By the common law, when a husband was banished, abjures the realm, or goes into exile, he becomes *civilliter mortuus*, and the wife's power of contracting, suing, and being sued revives"; and it adds, citing from Judge Swift, the most able exponent of the common law as applicable to that state: "On the same principle, where a husband has been sentenced to Newgate, or any of the public prisons of the United States for life, or even for a shorter time, it would seem the wife ought to have the same power to make contracts and to sue and be sued as a *feme sole*." We would suggest in this connection, however, that the right of a married women to sue and be sued as a *feme sole* is, in view of the constantly progressive legislation in her favor in the several states, dependent in almost every conceivable case which might arise upon other principles than those declared by Judge Swift. Administration might formerly be granted upon the estate of a monk as if he were actually dead, the administrator having the same rights as if he were naturally deceased: 1 Bla. Com. 132; and a lease determined upon a monk's entry into religion: *Id.* As to other persons civilly dead, see 33 & 34 Vict., c. 23; 1 Jarman on Wills, 5th ed., 42. In Ohio, the case of *Frazer v. Fulcher*, 17 Ohio, 260, holds that administration cannot be granted on the estate of a person under sentence of imprisonment for life. The reasoning in that case states the rule certainly of the common law fully and clearly, and to the result of the researches of the court in that case but very little can be added outside of the full consideration given the question in the principal case. The words of the court are, that there is nothing "in the legislation of the state which would authorize the appointment of an administrator upon the estate of a person in this situation,"—one imprisoned for life. We have failed to discover, after a most thorough examination, a single case of value, as determining the present law in this country, where it is held that any person other than a monk professed was considered *civilliter mortuus* to the extent that administration might be taken out for that reason upon his estate, or the land vest *eo instanti* by reason of such fact in his heirs. We deduce, therefore, that in those states where there is a statutory provision that one imprisoned for life shall be deemed civilly dead, the legislature could not have intended that such convict should labor under greater disabilities than those entailed by the common-law decisions; and if the strict rule of the common law is not to be followed, it must be assumed—and especially so in view of our institutions and tenures here, and also in view of the fact that such convict may be pardoned—that one *civilliter mortuus* under the statutes ought not to be deemed naturally dead so far as retaining his title to property and protecting it is concerned, and that it ought not certainly to devolve upon his successors or heirs simply because of the disability of imprisonment. This construction of those statutes would, it seems to us, be founded in greater justice and more in consonance with the reason of the law, and more in keeping with the spirit of our institutions, than a conclusion to the contra.

PARKHURST v. BERDELL.

[110 NEW YORK, 383.]

ESTOPPEL. — WHATEVER IS ADJUDICATED BETWEEN DEFENDANTS has the same effect between them as *res judicata* as if they appeared in the action as plaintiff and defendant.

AN APPEAL FROM A JUDGMENT DOES NOT SUSPEND ITS OPERATION as an estoppel.

REVERSAL OF JUDGMENT AFTER IT HAS BEEN RECEIVED AS EVIDENCE IN ANOTHER ACTION cannot operate retrospectively so as to render its reception erroneous. The fact of reversal cannot appear by the record in the second action; and the only remedy of the injured party, if any he have, is by motion for a new trial.

JUDGMENT WILL NOT BE REVERSED FOR THE RECEPTION OF IMPROPER EVIDENCE if the same result must have been reached had such evidence been excluded.

PARTY CONSENTING THAT WITNESS TESTIFY TO CONFIDENTIAL AND PRIVILEGED COMMUNICATIONS on direct and cross examination cannot thereafter have the evidence struck out on the ground that it related to a confidential communication.

CONFIDENTIAL COMMUNICATIONS BETWEEN HUSBAND AND WIFE WHEN ALONE, which the code of New York prohibits either from testifying to, are such only as are of a confidential nature, and are induced by the marital relation, and do not include ordinary conversations relating to matters of business.

ACTION by Mrs. Eliza Parkhurst against Robert H. Berdell, to compel him to account for moneys and securities to her belonging and by him appropriated, and to have the amount found due declared to be a lien on certain realty. The cause was referred to a referee, who found that plaintiff's husband, Sylvester C. Parkhurst, died April 12, 1867, at which time he was the owner of certain specified stocks and bonds which he bequeathed to plaintiff, and of which she took possession; that she loaned these securities to defendant in the years 1869 and 1870; that he sold part of them, and on a settlement with her, it was found that he owed her \$16,000, for which he gave her his note, dated July 1, 1870; that after this statement he still held securities belonging to plaintiff, and for which he gave her a receipt, dated January 1, 1870; that at a settlement in January, 1875, there was due plaintiff \$34,569.61, for which defendant gave her his note; and he still had the securities mentioned in the receipt, and he refused to return them on demand, and had converted them; that on September 24, 1873, to secure the payment of indebtedness to plaintiff and the return of her securities or their proceeds, defendant executed his bond to plaintiff for \$80,000, and he and his wife executed a mortgage on real estate in New York City; that that mortgage

was satisfied, and in its stead a mortgage was given by defendant on real estate in the town of Goshen, Orange County, New York; that this latter mortgage was handed to defendant to be recorded, but he neglected and refused to place it of record; that a deed of trust, dated December 12, 1862, purporting to be made by defendant to Sylvester C. Parkhurst, for lands in New York City, was never delivered, nor did it ever become an operative instrument; and finally, that plaintiff was entitled to judgment for \$125,620.80, and to a lien on the Goshen realty for \$80,000, and interest, to the same extent as if the mortgage had been recorded. Judgment entered in the trial court, pursuant to the report of the referee, was affirmed by the general term on appeal.

Calvin Frost, for the appellant.

S. W. Fullerton, for the respondent.

EARL, J. A careful scrutiny of the record satisfies us that there was sufficient evidence to warrant the essential findings of the referee, and they, having been affirmed by the general term, must remain undisturbed. The facts found justified the relief granted, and it is incumbent upon us now only to consider whether there were any errors committed by the learned referee in his rulings during the progress of the trial.

The plaintiff offered in evidence the judgment roll in an action of "Ambrose S. Murray (suing on behalf of himself and all other judgment creditors of Robert H. Berdell who shall come in and seek relief by and contribute to the expenses of this suit) against Robert H. Berdell, Charles P. Berdell, Mrs. A. Berdell, Erastus S. Spencer as receiver of Robert H. Berdell, and Eliza W. Parkhurst." The defendant objected to the admissibility of the record in evidence "as not being competent testimony in this case against him," and the objection was overruled and the record received in evidence.

It does not appear for what purpose the record was offered and received, nor was any particular objection to it specified. It does not appear what use the referee made of it, and it is impossible to perceive what, if any, weight or bearing it had upon his determination. There was no finding in reference to it, and none was requested. The counsel for the appellant did not, in his argument before us, point out wherein he regarded the record incompetent as evidence when it was received; and we are unable to say that it was incompetent.

The action in which that judgment was rendered was brought, among other things, to set aside certain conveyances of and liens upon the lands of Robert H. Berdell, as a fraud upon his creditors, and, among other things, the court found, as the referee found in this action, that certain deeds, absolute in form, given by Berdell to Mrs. Parkhurst, were subsisting mortgages, and that he was indebted to her just as the referee found he was in this action, and that he gave her the first mortgage for eighty thousand dollars, and the substituted mortgage upon the Goshen property for the same sum, under the circumstances and upon the consideration found by the referee in this action; and it was found and adjudged there that the trust deed for the benefit of his children had never been delivered, and never took effect. Mrs. Parkhurst was a party to that action, and there was litigation between her and him as adverse parties, although both of them were defendants, and therefore whatever was adjudicated as between them estopped them as if the adjudication had been made in an action wherein one of them was plaintiff and the other defendant. As it appears to have been material to establish in this action some of the matters adjudicated in that in favor of Mrs. Parkhurst, it was competent for her to establish them by the judgment roll introduced in evidence. But that judgment was rendered in September, 1878, and before the trial of this action an appeal had been taken to the general term. That is all that appeared upon the trial of this action. But the appeal did not suspend the operation of the judgment as an estoppel. The records of our court, however, disclose that that judgment was affirmed at the general term, and upon appeal to this court, was reversed in October, 1884, on the ground that, as matter of law, upon the undisputed facts, the trust deed above mentioned was delivered, and did take effect: *Wallace v. Berdell*, 97 N. Y. 13. Upon the argument before us, the only objection specified to the judgment roll as evidence was that the judgment had thus, several years after it had been received in evidence, been reversed. But such an objection is not available; it does not appear in the record now before us. If the judgment roll was competent evidence when received, its reception was not rendered erroneous by the subsequent reversal of the judgment. Notwithstanding its reversal, it continued, in this action, to have the same effect to which it was entitled when received in evidence. The only relief a party against whom a judgment which has

been subsequently reversed has thus been received in evidence can have is to move on that fact, in the court of original jurisdiction, for a new trial, and then the court can, in the exercise of its discretion, grant or refuse a new trial, as justice may require.

I might stop here upon this branch of the case; but the learned counsel for the plaintiff seems to admit that the judgment in that action had ceased, by its reversal, longer to have any effect, and hence I ought to proceed further, and show that the receipt of the judgment roll did not prejudice the defendant. We are still confronted with the difficulty to determine for what purpose it was offered, and what effect, if any, was given to it as evidence. But the counsel on both sides seem to assume that it was introduced for the purpose of establishing the fact that the trust deed was not delivered, and that it never took effect, and I will proceed upon that assumption. This court, upon the appeal in the other case, did not determine that Berdell's evidence as to the delivery of the trust deed ought to have been credited, but that the undisputed facts showed in law a delivery; and as the facts proved in this case as to the delivery of that deed were substantially the same as those proved in that case, we must assume that the deed was delivered, and that it had operation and effect, and that therefore the referee erred in his conclusion that it was not delivered. We are, nevertheless, upon this assumption, of opinion that the error was not prejudicial to defendant. The evidence on the part of the plaintiff was to the effect that the first mortgage of eighty thousand dollars was given to secure her, as found by the referee. The evidence on the part of the defendant was to the effect that the mortgage, although made to her, was given to secure his son Charles for his interest in the trust property which he had conveyed and used for his own benefit. The referee wholly discredited his evidence, and found, upon proof greatly preponderating, that it was given for the purpose claimed by her. In view of all the evidence, which cannot be particularized here, we think the finding of the referee as to that mortgage would have been the same if he had also found, as a matter of law, that the trust deed had been actually delivered. But still further, he testified that he never promised to give, and never gave, the substituted mortgage, and denied all plaintiff's evidence in reference thereto. The referee wholly discredited this evidence, and found that the mortgage was given as claimed by the plaintiff, and that

mortgage rests wholly upon the evidence furnished in her behalf. The defendant makes no claim or pretense that that mortgage was executed for the benefit of his son, or that it had any connection with or relation to the trust deed. He denies its existence, and if it had existence, it must have been made for the purpose testified to by her. We can therefore see no reason for saying, upon any view of the case, that this judgment ought to be reversed on account of the reception of the judgment roll in evidence, or the finding of the referee there complained of.

During the progress of the trial, Mrs. Berdell, the wife of the defendant, upon the examination of plaintiff's counsel, gave evidence as to conversations with him when they were alone as to plaintiff's securities taken by him, his obligations to her for the same, and his promise to secure her therefor. She was cross-examined by his counsel as to the same conversations, and then, after the answers had been taken, his counsel having previously made no objection to the evidence, moved to strike it out, on the ground that the conversations were confidential communications, and prohibited under section 831 of the code. The motion was denied, and this is now complained of as error. It is a complete answer to this exception that the objection came too late. The defendant could not lie by, tacitly consent to the examination, and take his chances as to the evidence, and, when it proved unsatisfactory to him, complain of its admissibility: *Quin v. Lloyd*, 41 N. Y. 349; *Miller v. Montgomery*, 78 Id. 282. But if the objection to the evidence had been timely, it would not have been available. The section of the code referred to forbids not all communications between husband and wife, but only confidential communications. What are confidential communications within the meaning of the section? Clearly not all communications made between husband and wife when alone. If such had been the meaning, it would have been so provided in general and simple terms. They are such communications as are expressly made confidential, or such as are of a confidential nature, or induced by the marital relation. The conversations with her husband, testified to by Mrs. Berdell, cannot be excluded by the application of any of these tests. They were ordinary conversations relating to matters of business, which there is no reason to suppose he would have been unwilling to hold in the presence of any person. There was therefore no violation of the section of the code cited.

We have now noticed the principal objections relied upon by the defendant. Others were argued, and we have given them careful consideration. It is sufficient to say of them that we do not find in them any occasion for the reversal of this judgment.

The judgment should be affirmed, with costs.

DEFENDANTS ARE ESTOPPED TO SAME DEGREE BY JUDGMENT which determines their rights as against each other as if they were respectively complainant and defendant: See *Harmon v. Auditor*, 123 Ill. 122; 5 Am. St. Rep. 502.

JUDGMENT IS CONCLUSIVE UPON POINTS INVOLVED UNTIL ANNULLED OR REVERSED by a proper proceeding: *Ellis v. Clarke*, 19 Ark. 420; 70 Am. Dec. 603; *Tadlock v. Eccles*, 20 Tex. 782; 73 Am. Dec. 213; and see the extended note to *Lea v. Lea*, 96 Id. 775 et seq.

THE EFFECT OF AN APPEAL is, in the majority of the states, limited to bringing the judgment before the appellate court for review; and if a proper stay bond has been given, to suspend the right to enforce it by execution. In other respects, it remains in force, and may be relied upon as an estoppel: *Nill v. Compant*, 16 Ind. 107; 79 Am. Dec. 411; *Bank of N. A. v. Wheeler*, 28 Conn. 433; 73 Am. Dec. 683; *Faber v. Hovey*, 117 Mass. 108; *Planters' Bank v. Calvert*, 3 Smedes & M. 143; 41 Am. Dec. 616; *Scheible v. Slagle*, 89 Ind. 323. In other states a different rule prevails; and a judgment, pending an appeal therefrom, has not the effect of *res judicata*: *Freeman on Judgments*, sec. 328; *Souter v. Baymore*, 7 Pa. St. 415; 47 Am. Dec. 518; *State v. McInfire*, 1 Jones, 1; 59 Am. Dec. 566.

THAT HUSBAND AND WIFE ARE COMPETENT TO TESTIFY AS TO CONVERSATIONS between them relating to business done by one as the agent of the other is held to be the law in *Commonwealth v. Hayes*, 145 Mass. 289.

PEOPLE v. KING.

[110 NEW YORK, 412.]

INDICTMENT FOLLOWING LANGUAGE OF STATUTE IS GENERALLY SUFFICIENT; and where the statute makes the exclusion of persons from certain privileges an offense, the circumstances constituting the offense need not be particularly averred.

INDICTMENT FOR EXCLUDING COLORED MEN FROM A SKATING RINK IS SUPPORTED BY EVIDENCE OF REFUSAL TO SELL THEM TICKETS, without which they would not be admitted.

CONSTITUTIONAL LAW. — SECTION OF PENAL CODE OF NEW YORK DECLARING THAT "NO PERSON CAN, BY REASON OF RACE, COLOR, OR PREVIOUS CONDITION OF SERVITUDE, be excluded from the equal enjoyment of any accommodation, facility, or privilege furnished by innkeepers or common carriers, or by owners, managers, or lessees of theaters or other places of amusement, by teachers and officers of common schools and public institutions of learning, or by cemetery associations," is constitutional. The statute is a valid exercise of the police powers of the state.

INDICTMENT against the defendant, as proprietor of a public skating rink, for violating section 383 of the Penal Code of New York. Verdict and judgment of conviction were affirmed by the general term.

E. H. Prindle, for the appellant.

George P. Pudney, for the respondent.

ANDREWS, J. Section 383 of the Penal Code declares that "no citizen of this state can, by reason of race, color, or previous condition of servitude, be excluded from the equal enjoyment of any accommodation, facility, or privilege furnished by innkeepers or common carriers, or by owners, managers, or lessees of theaters or other places of amusement, by teachers and officers of common schools and public institutions of learning, or by cemetery associations." The violation of this section is made a misdemeanor, punishable by fine of not less than fifty nor more than five hundred dollars.

The defendant and one Scott, in the year 1884, were the owners and proprietors of a skating rink in the village of Norwich, in this state, erected in that year upon their own lands. Prior to June 13, 1884, they announced, through the public press and otherwise, that the rink would be opened on the evening of that day, and they arranged with the Apollo Club, of Binghamton, to attend the opening to give an exhibition of roller skating, the profits of the entertainment to be divided between the club and the proprietors of the rink. Tickets of admission were sold on the evening in question by the agents of the proprietor, at the office on the premises, but persons who had not procured tickets were admitted on payment of the charge for admission at the door. Several hundred persons attended the exhibition. During the evening, three colored men made application to purchase tickets at the office where tickets were sold, but the agents of the proprietors having charge of the sale, acting in accordance with the instructions of the defendant, refused to sell them tickets because they were persons of color, and they were so informed at the time. The defendant was indicted under the section of the Penal Code above quoted, the indictment alleging, in substance, that the defendant, being one of the owners of a skating rink, a place of amusement, did, on the day named, exclude from said skating rink, and from the equal enjoyment of any and all accommodation, facility, and privilege of said skating rink,

George F. Breed, William Wyckoff, Charles Robbins, and others, all being citizens of the state, by reason of race and color, etc. The objection is now taken that the indictment is defective in substance, in not averring the means by which the exclusion of the persons mentioned was effected. The objection is untenable. The indictment follows the statute, and it was not necessary to aver, with any greater particularity than was used, the circumstances constituting the offense: *People v. West*, 106 N. Y. 293; 60 Am. Rep. 452. Nor is there any force in the suggestion that proof of a refusal to sell to the colored men tickets of admission at the office did not support the allegation that they were excluded from the rink. The defendant provided tickets as evidence of the right of persons having them to admission. He refused to furnish this evidence to the persons named in the indictment, which was furnished to all others who applied, placing the refusal on a ground which justified the applicants in supposing and the jury in finding that the defendant thereby intended to exclude them, and did thereby exclude them, from the rink.

The real question in the case arises upon the contention of the counsel for the appellant that the statute upon which the indictment is founded, so far as it undertakes to prescribe that the owner of a place of amusement shall not exclude therefrom any citizen by reason of race, color, or previous condition of servitude, is an unconstitutional interference with private rights, in that it restricts the owner of property in respect to its lawful use, and as to an incident which is not a legitimate matter of regulation by law.

The legislation in question is not without precedent. The act of Congress of March 1, 1875, entitled "An act to protect all persons in their civil rights" (18 U. S. Stats. at Large, 335), contains a section identical in import with section 383 of the Penal Code, except that it is still broader in its scope, and secures, not to citizens only, but to all persons within the jurisdiction of the United States, the equal enjoyment of the accommodation, advantages, facilities, and privileges of "inns, public conveyances on land and water, theaters, and other places of public amusement, subject only to the limitations established by law, and applicable to citizens of every race and color, regardless of any previous condition of servitude." The civil rights act of Mississippi, passed February 7, 1873, contains a similar provisions. In Louisiana, the matter is made the subject of a constitutional enactment, ordaining that

"all persons shall enjoy equal rights and privileges, etc., in every place of public resort"; and this was supplemented by acts of the legislature of Louisiana, passed in 1870 and 1871.

It is not necessary at this day to enter into any argument to prove that the clause in the bill of rights that no person shall "be deprived of life, liberty, or property without due process of law" (Const., art. 1, sec. 6) is to have a large and liberal interpretation, and that the fundamental principle of free government, expressed in these words, protects not only life, liberty, and property, in a strict and technical sense, against unlawful invasion by the government in the exertion of governmental power in any of its departments, but also protects every essential incident to the enjoyment of those rights. The interpretation of this time-honored clause has been considered, in recent cases in this court, with a fullness and completeness which leaves nothing to be said by way of support or illustration: *Wynehamer v. People*, 13 N. Y. 378; *Bertholf v. O'Reilly*, 74 Id. 509; *In re Jacobs*, 98 Id. 98; *People v. Marx*, 99 Id. 377; 52 Am. Rep. 34.

But, as the language of the constitutional prohibition implies, life, liberty, and property may be justly affected by law, and the statutes abound in examples of legislation limiting or regulating the use of private property, restraining freedom of personal action, or controlling individual conduct, which, by common consent, do not transcend the limitations of the constitution. This legislation is under what, for lack of a better name, is called the police power of the state, a power incapable of exact definition, but the existence of which is essential to every well-ordered government. By means of this power the legislature exercises a supervision over matters involving the common weal, and enforces the observance, by each individual member of society, of the duties which he owes to others and to the community at large. It may be exerted whenever necessary to secure the peace, good order, health, morals, and general welfare of the community; and the propriety of its exercise within constitutional limits is purely a matter of legislative discretion, with which the courts cannot interfere. In short, the police power covers a wide range of particular unexpressed powers reserved to the state affecting freedom of action, personal conduct, and the use and control of property. "All property," said Shaw, C. J., in *Commonwealth v. Alger*, 7 Cush. 85, "is held subject to those general regulations which are necessary to the common good and gen-

eral welfare." This power, of course, is subject to limitations. The line of demarkation between its lawful and unlawful exercise it is often difficult to trace. We have held that it cannot be exerted for the destruction of property lawfully held and acquired under existing laws, or of any of the essential attributes of such property: *Wynehamer v. People*, *supra*; nor to deprive an individual of the right to pursue a lawful business on his own premises, not injurious to the public health, or otherwise inimical to the public interests: *In re Jacobs*, *supra*; nor to prevent the manufacture or sale of a useful article of food: *People v. Marx*, *supra*. But we have held that the legislature may lawfully subject the owner of premises to pecuniary liability for injuries resulting from intoxication caused in whole or in part by the use of liquor sold by the lessee therein, although the sale itself was lawful: *Bertholf v. O'Reilly*, *supra*. And it was held by the supreme court of the United States in *Munn v. Illinois*, 94 U. S. 118, that a state law regulating the licensing of elevators for the handling and storage of grain, and fixing a maximum charge therefor, was not repugnant to that part of the fourteenth amendment of the constitution of the United States which ordains that "no state shall deprive any person of life, liberty, or property without due process of law."

In considering whether the enactment of section 883 of the Penal Code transcends legislative power, it is important to have in mind the purpose of the enactment. It cannot be doubted that it was enacted with special reference to citizens of African descent, nor is there any doubt that the policy which dictated the legislation was to secure to such persons equal rights with white persons to the facilities furnished by carriers, innkeepers, theaters, schools, and places of public amusement. The race prejudice against persons of color, which had its root, in part at least, in the system of slavery, was by no means extinguished when, by law, the slaves became freemen and citizens. But this great act of justice towards an oppressed and enslaved people imposed upon the nation great responsibilities. They became entitled to all the privileges of citizenship, although the great mass of them were poorly prepared to discharge its obligations. The nation secured the inviolability of the freedom of the colored race and their rights as citizens by the thirteenth, fourteenth, and fifteenth amendments of the constitution of the United States. The fourteenth amendment ordained, among other things, that "no state shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws."

The construction of the fourteenth amendment has come under the consideration of the supreme court of the United States in several cases, among others, in two cases known as the jury cases: *Strauder v. West Virginia*, 100 U. S. 303, and *Ex parte Virginia*, 100 Id. 339. In the case first mentioned it was held that a state law confining the selection of jurors to white persons was in contravention of the fourteenth amendment, and in the second, that the action of the state officer invested with the power to select jurors excluding all colored persons from the lists was also repugnant to its provisions. In *Strauder v. West Virginia*, *supra*, Strong, J., speaking for the majority of the court, said: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right most valuable to the colored men, the right of exemption from unfriendly legislation against them distinctively as colored; exemption from legal discrimination implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

We have referred to these amendments, and to the cases construing them, because they disclose the fact that, in the judgment of the nation, the public welfare required that no state should be permitted to establish by law such a discrimination against persons of color as was made by the defendant in this case; for we think it incontestable that a state law excluding colored people from admission to places of public amusement would be considered as a violation of the federal constitution. It would seem, indeed, in view of the act of March 1, 1875, that, in the opinion of Congress, the amendments had a much broader scope, and prevented, not only discriminating legislation of this character by the state, but also such discrimination by individuals, since the jurisdiction of Congress to pass a law forbidding the exclusion of persons of color from places of public amusement, and annexing a penalty for its violation, must be derived, if it exists, from the thirteenth, fourteenth, and fifteenth amendments. It cannot be doubted that before they were adopted the power to enact such a regulation resided exclusively in the states. But, inde-

pendently of the inference arising from the solemn assertion by the nation, through its action in adopting the amendments, that legal discriminations against persons of color by the action of states was opposed to the public welfare, it is not difficult to see that there is a public interest which justified the enactment of section 385 of the code, provided it did not overstep the limits of lawful interference with the uses of private property. The members of the African race born or naturalized in this country are citizens of the states where they reside, and of the United States. Both justice and the public interest concur in a policy which shall elevate them as individuals, and relieve them from oppressive or degrading discrimination, and which shall encourage and cultivate a spirit which will make them self-respecting, contented, and loyal citizens, and give them a fair chance in the struggle of life, weighted, as they are at best, with so many disadvantages. It is evident that to exclude colored people from places of public resort on account of their race is to fix upon them a brand of inferiority, and tends to fix their position as a servile and dependent people. It is, of course, impossible to enforce social equality by law. But the law in question simply insures to colored citizens the right to admission, on equal terms with others, to public resorts, and to equal enjoyment of privileges of a *quasi* public character. The law cannot be set aside, because it has no basis in the public interest, and the promotion of the public good is the main purpose for which the police power may be exerted; and whether, in a given case, it shall be exerted or not, the legislature is the sole judge, and a law will not be held invalid because, in the judgment of the court, its enactment was inexpedient or unwise.

The final question, therefore, is, Does the law in question invade the right of property protected by the constitution? The state could not pass a law making the discrimination made by the defendant. The amendments to the federal constitution would forbid it. May not the state impose upon individuals having places of public resort the same restriction which the federal constitution places upon the state? It is not claimed that that part of the statute giving to colored people equal rights at the hands of innkeepers and common carriers is an infraction of the constitution. But the business of an innkeeper or a common carrier, when conducted by an individual, is a private business, receiving no special privilege

or protection from the state. By the common law, innkeepers and common carriers are bound to furnish equal facilities to all, without discrimination, because public policy requires them so to do. The business of conducting a theater or place of public amusement is also a private business in which any one may engage, in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the legislature to confer upon municipalities the power to regulate by ordinance the licensing of theaters and shows, and to enforce restrictions relating to such places in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the constitution.

The statute in question assumes to regulate the conduct of owners or managers of places of public resort in the respect mentioned. The principle stated by Waite, C. J., in *Munn v. Illinois*, 94 U. S. 113, which received the assent of the majority of the court, applies in this case. "Where," says the chief justice, "one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public, for the common good, to the extent of the interest he has thus created." In the judgment of the legislature, the public had an interest to prevent race discrimination between citizens, on the part of persons maintaining places of public amusement, and the quasi public use to which the owner of such a place devoted his property gives the legislature a right to interfere. If the defendant, instead of basing his exclusion of a class of citizens upon color, had made a rule excluding all Germans, or all Irishmen, or all Jews, the law as applied to such a case would have seemed entirely reasonable: *United States v. New-comer*, 11 Phila. 519. But the principle is the same, and if the law could be sustained in the one case, it may in the other. The validity of similar statutes in Mississippi and Louisiana has been sustained by the courts in those states: *Donnell v. State*, 48 Miss. 661; *Joseph v. Bidwell*, 28 La. Ann. 382; 26 Am. Rep. 102. The statute does not interfere with private entertainments or prevent persons not engaged in the business of keeping a place of public amusement from regulating admission to social, public, or private entertainments given by them as they may deem best, nor does it seek to compel social equality. It was, we think, a valid exercise of

the police power of the state over a subject within the cognizance of the legislature.

The judgment should be affirmed.

INDICTMENT CHARGING OFFENSE IN WORDS OF STATUTE, WHEN SUFFICIENT: See extended note to *State v. Campbell*, 94 Am. Dec. 253-258.

STATE LAWS PROVIDING THAT PERSONS SHALL BE ENTITLED to equal accommodation at public places, such as inns, places of amusement, etc., and that no discrimination shall be made on account of race, color, etc., are valid: *Joseph v. Bidwell*, 28 La. Ann. 382; 26 Am. Rep. 102; note to *McCrea v. Marsh*, 71 Am. Dec. 749; but see the note last cited as to the effect of such laws as applied to the right to admission to places of amusement.

McCLELLAND v. NORFOLK SOUTHERN RAILROAD Co.

[110 NEW YORK, 492.]

NOTICE. — REFERENCE IN COUPONS TO THE MORTGAGE AND BONDS, and in the bonds to the terms and conditions of the mortgage, charges the holders of both coupons and bonds with notice of the provisions contained in the instruments to which reference is made.

NEGOTIABILITY OF COUPONS, THOUGH DETACHED FROM THE BOND, IS DESTROYED if they contain a reference to other instruments, and from such instruments it appears that the time of payment of such coupons is subject to a contingency over which their holders have no control.

A COUPON, TO BE NEGOTIABLE, must provide for unconditional payment to a person, or order or bearer, of a certain sum of money at a time capable of exact ascertainment.

WHERE A MAJORITY OF BOND-HOLDERS WERE AUTHORIZED, IN CASE OF DEFAULT, to waive such default, and to instruct the mortgage trustees to waive it, but no action on the part of the bond-holders or trustees was to affect any subsequent default, the bond-holders cannot anticipate a default, nor, in advance of such default, can they give the trustees a valid instruction to postpone the payment of interest five years.

ACTION on interest coupons. Judgment for plaintiff in the trial court was reversed by the general term.

Albert Gallup, for the appellant.

George W. Wingate, for the respondent.

RUGER, C. J. The complaint counts upon fourteen several interest coupons for the sum of thirty dollars each, and alleges the liability of the defendant thereon, by virtue of its assumption of the obligations of the Elizabeth and Norfolk Railroad Company, who were the makers of such coupons.

The answer sets up as a defense that the time for the payment of the coupons for a period of five years, covering those

in question, had, for a good consideration, been extended by a majority of the holders of bonds issued simultaneously with those from which such coupons had been detached, under the authority of provisions contained in the bond and mortgage given as security therefor. The case was submitted to the trial court upon an agreed statement of facts, from which, among other things, it appeared that the bonds from which such coupons were detached formed a series of nine hundred for one thousand dollars each, with coupons attached, providing for the payment of interest semi-annually, issued by the Elizabeth City and Norfolk Railroad Company in 1880, and secured by a first mortgage upon its property and franchises, executed and delivered to trustees for such bond-holders, and that the defendant had lawfully assumed the payment of the obligations of such company.

The coupons or interest warrants were in the following form:—

"On the first day of [blank month and year] the Elizabeth City and Norfolk Railroad Company will pay to the bearer, at its financial agency in the city of New York, thirty dollars in gold (\$30), being six months' interest then due upon its first-mortgage bonds, No. ——. W. G. DOMINICK, Treasurer."

The bonds each contained a statement that "full payment of the principal and interest of . . . the said series of bonds is secured by a deed of trust or mortgage," upon the property and franchises of said railroad, "upon the terms and conditions fully set forth in the said mortgage or deed of trust"; and also that "this bond shall pass by delivery," and "in case default shall be made in the payment of any of the half-yearly installments of interest on this bond, . . . and if such interest shall remain unpaid for the period of six months, . . . the principal of this bond shall, at the option of the holder, . . . become forthwith due and payable immediately upon the terms and with the effect mentioned in said deed of trust or mortgage."

For the purpose of securing "the payment of said bonds and interest coupons," the company executed a mortgage, whereby it granted, bargained, and sold to the trustees therein named all of the property "now held, or which may hereafter be acquired, for or in connection with the construction, operation, maintenance, reparation, or replacement of the said railroad or its several branches, . . . and also all rights, powers, privileges, and franchises now held or hereafter acquired by

the said party of the first part." By section 4 it further provided that "in case default shall be made in the payment of any of the interest warrants hereby secured to be paid, and such default continue for six months after payment shall have been duly demanded," then, at the option of said trustees, the whole principal sum secured to be paid shall become due and payable, and upon request of one half in interest of the holders of said bonds, it is made the duty of said trustees to declare such principal sum due as aforesaid"; but, nevertheless, a majority in interest of said bond-holders may, in case of such default, by an instrument in writing signed by them, instruct the said trustees to declare said principal sum due, or waive their right so to do, upon such terms and conditions as such majority shall deem proper, or may annul or reverse the election made by the trustees, anything herein contained to the contrary notwithstanding; but the action of the trustees or bond-holders in case of any default shall not affect any subsequent default on the part of the party of the first part, or impair any right resulting therefrom."

By section 7 it was further provided that "it is hereby declared and agreed . . . that it shall be the duty of, and it is hereby made obligatory upon, the said trustees . . . to execute the powers of sale or entry hereby granted, or both, or to take appropriate proceedings at law or in equity to enforce the rights of bond-holders under these presents upon requisition in writing, as hereinafter specified, to wit. . . . But in every case in which the default shall be in the payment of the money hereby secured, or any part thereof (in respect of any covenant or agreement in said bonds, or herein contained), such duty of the said trustees, and also their power to make elections in the premises, are hereby declared to be subject to the right and power of a majority in interest of the holders of the bonds hereby secured and then outstanding to instruct the said trustees to waive such default or to enforce their rights thereunder, and no action of the said trustees or bond-holders in case of any default shall affect any subsequent default or any right arising therefrom."

Previous to the first day of September, 1884, more than four fifths of said bond-holders had united, by signing an instrument in writing, in requesting the trustees to postpone the payment of any interest accruing on the bonds during the succeeding five years, to enable the company to use the funds thereby to be acquired in the improvement of the track and

rolling stock of the railroad, and to issue to the bond-holders, in place of the postponed coupons, certificates for the amount of the same, payable at a future time, with interest. The trustees assented to such request, and immediately gave notice to the company to that effect, and also gave a formal extension upon all coupons which had matured up to the time of the trial after they became due, respectively. Relying upon such extension, the defendant executed and delivered its certificates for the payment to the trustees of such postponed interest, and they were distributed to and received and accepted by upwards of nine tenths in amount of the bond-holders, who thereupon delivered up their respective coupons to the trustees. The defendant also, upon the faith of such arrangement, proceeded to lay out and pledge the funds received and anticipated from this arrangement in the improvement of its road and the extension of its facilities for the transportation of freight and passengers. Several questions arise upon this statement of facts, the most material of which we conceive to be those which refer to the meaning and intent of the provisions in the mortgage relating to the waiver by the trustees and bond-holders of defaults in the payment of moneys secured thereby, and as to the negotiability of the coupons attached to said bonds.

In determining the character of the coupons in respect to their negotiability, the court is required, we think, to examine each of the securities simultaneously executed by the defendant, viz., the mortgage, the bonds, and coupons, for the purpose of discovering the intent and meaning of the contract thereby made. The reference in the coupons to the mortgage and bonds, and in the bonds to the terms and conditions of the mortgage, clearly, we think, charges the holders of both coupons and bonds with notice of the provisions contained in each of such instruments. If, therefore, according to the plain intent and meaning of the provisions in the mortgage, it was designed to invest a majority of the bond-holders thereunder with power, at their option, to waive defaults in the payment of moneys secured by said mortgage, we do not see how the claim that these coupons were negotiable instruments can be supported. If such coupons were negotiable instruments, invested with the qualities pertaining to such securities, the mortgage and bonds to which they were attached when issued cannot be resorted to to qualify, limit, or explain the agreement therein expressed. In that event, their holders, having

purchased them in good faith, for value, and without notice of any defense existing thereto, would be entitled to maintain an action thereon, and recover according to well-settled principles of commercial law.

If, however, these coupons contained notice to the holders of any facts or circumstances showing that the time of their payment was subject to a contingency over which the holder had no control, and which might postpone their payment indefinitely, then they could not be said to be *bona fide* holders thereof, as the negotiability of the paper would be thereby destroyed. It is undoubtedly the general rule that the bonds of railroad, manufacturing, municipal, and other like corporations, payable to bearer, issued for the purpose of securing loans of money, are, in this country, deemed negotiable, and coupons thereto attached partake of the same character: Rorer on Railroads, 250; *Evertson v. Bank of Newport*, 66 N. Y. 14; 23 Am. Rep. 9; *Thompson v. Lee County*, 3 Wall. 327; *Commissioners v. Aspinwall*, 21 How. 539. But when such instruments contain special stipulations, and their payment is subject to contingencies not within the control of their holders, they are, by established rules, deprived of the character of negotiable instruments, and become exposed to any defense existing thereto, as between the original parties to the instrument. It is essential by such rules that such paper should provide for the unconditional payment to a person, or order or bearer, of a certain sum of money at a time capable of exact ascertainment: 3 R. S., 7th ed., 2243; Daniel on Negotiable Instruments, secs. 27-104; *Evertson v. Bank of Newport*, *supra*; *Frank v. Wessels*, 64 N. Y. 155; *Dinsmore v. Duncan*, 57 Id. 580; 15 Am. Rep. 534. It would seem, therefore, if these coupons were subject to the condition that the time of their payment could be changed, altered, and postponed from time to time at the option of a majority of the holders of the series of bonds simultaneously issued therewith, it would deprive them of one of the essential characteristics of negotiable paper.

It was held in *McClure v. Township of Oxford*, 94 U. S. 429, in an action upon coupons detached from the bonds of a municipal corporation, which were substantially similar in form to the coupons under consideration, that the bonds "carried upon their face unmistakable evidence that the forms of law under which they purported to have been issued had not been complied with. . . . This suit was brought upon cou-

pons detached from the bonds purchased by the plaintiff in error, before maturity, but upon their face they refer to the bonds, and purport to be for the semi-annual interest accruing thereon. This puts the purchaser upon inquiry for the bonds, and charges him with notice of all they contain."

City v. Lamson, 9 Wall. 478, was an action brought upon coupons detached from the bonds of a municipal corporation, and it was there held that the action was not barred by the lapse of time which would outlaw a simple contract debt, but that there was "but one contract, and that evidenced by the bond, which covenanted to pay the bearer five hundred dollars in twenty years, with semi-annual interest at the rate of ten per cent per annum. . . . The coupon is simply a mode agreed on between the parties for the convenience of the holder in collecting the interest as it becomes due. Their great convenience and use in the interests of business and commerce should commend them to the most favorable view of the court; but even without this consideration, looking at their terms, and in connection with the bond of which they are a part, and which is referred to on their face, in our judgment it would be a departure from the purpose for which they were issued, and from the intent of the parties to hold, when they are cut off from the bond for collection, that the nature and character of the security changes and becomes a simple contract debt instead of partaking of the nature of the higher security of the bond which exists for the same indebtedness." It was therefore held that the coupons did not outlaw until the statutory time had run against the bond. The clear implication from the doctrines of this case seems to be that although an action may be maintained upon the coupons without the production of the bond, a recovery must be based upon the obligation contained in the bond, and that no recovery can be had contrary to the agreement therein expressed: *Clark v. Iowa City*, 20 Id. 583.

If, therefore, the act of the trustees in postponing the payment of the interest becoming due on September 1, 1884, and the five years succeeding, was authorized by the provisions of the mortgage, it must follow that the holders of coupons are bound by their action, and are not entitled to maintain actions at law upon such coupons.

The solution of this question requires an examination of the provisions of the mortgage. This case has been argued upon the assumption, by both parties, that the mortgage did

provide for a postponement of the time of payment of both the principal sum, and interest, by the action of a majority of the bond-holders. It is, however, claimed by the appellant that the bond-holders could not anticipate and provide for a default in the payment of interest before such default had actually occurred.

We shall consider the case, therefore, upon the assumption that it contains authority for action upon the part of a majority of the bond-holders to postpone the time for the payment of the interest coupons, and the only question arising thereon is whether, under a reasonable construction of the terms of the mortgage, this can be done before default has occurred.

This mortgage, in accordance with familiar rules, must be construed according to the intent of the parties in making it, and that intent, if its language is plain and unambiguous, must be derived from an examination of the instrument itself. That contains the measure of the liability of the mortgagor as well as a definition of the power, duties, and rights of the trustees and bond-holders named therein.

We can find nothing in this instrument which confers any power upon the trustees of their own motion to waive defaults in the payment of interest, or to anticipate such defaults and postpone the time of payment thereof. That power, if conferred at all, is given to a majority of the bond-holders, and the trustees have no authority to act in that respect except under the instructions of the bond-holders.

The provisions of the mortgage relating to this subject are substantially contained in the fourth and seventh paragraphs hereinbefore recited. The conditions under which power is conferred upon the trustees and bond-holders to waive defaults, contained in the fourth paragraph, relate exclusively to defaults already made, and which have continued to exist for the space of six months after payment of such interest has been duly demanded. The trustees are then vested with the option of declaring the principal sum due and payable, and their action in respect thereto is made subject to review and correction by a majority of the bond-holders; but the exercise of any power on the part of either trustees or bond-holders is conditioned upon the existence of a default which has continued for the prescribed period.

It is quite clear that the defendant has not brought the case within the contingency provided for in this provision. It must, therefore, rely upon the provision contained in the seventh

paragraph, if its contention can be sustained at all upon the facts of this case.

That paragraph relates wholly to the duties imposed upon the trustees, upon the contingencies arising under the mortgage, authorizing them to enforce the remedies therein provided, and the circumstances under which the performance of that duty may be compelled or waived by the bond-holders. Certainly no duty can rest on the trustees to enforce the mortgage until a default has occurred; and it is only in case of such a default, and the omission of the trustees to perform "such duty," that the bond-holders are authorized to act under the paragraph in question, and even in the event of any such action it is expressly provided that "no action of the trustees or bond-holders in case of any default shall affect any subsequent default, or any right arising therefrom."

It is quite impossible to reconcile this provision with the claim that the bond-holders can anticipate a default, and provide for the operation of their action upon a future event. Such action is expressly prohibited by the terms of the agreement; and, in the face of such prohibition, such a power cannot be implied from other language of the instrument. The plain meaning of the provision contemplates action by the bond-holders upon an existing condition of things, and the exercise of their judgment upon a situation which has already occurred. Not only the obligor, but each bond and coupon holder, is interested in the exercise of the powers referred to, and has the right to insist that the conditions of its exercise provided by the contract, so far as they are material, shall be fully and exactly complied with. Any other construction would place the rights of a minority at the discretion or caprice of a majority, and leave it practically powerless to avail itself of the security provided for it by the plain language of the contract. Assuming the right of bond-holders, after a default has occurred, to waive defaults in the payment of interest, and postpone the time of their payment, a question might arise as to the effect of such action upon suits then pending for the recovery of interest coupons; but that question is not now before us, and it would be improper to express any opinion thereon.

Action taken by a majority of bond-holders in waiving default which has already occurred we have not considered, as the facts of the case do not present that question; but we are of the opinion that no action by the trustees or bond-

holders is authorized by the mortgage in anticipation of such default.

The action of the trustees in granting a formal extension of time for the payment of the coupons in question, after default had been made thereon, would, we think, have barred an action upon coupons past due, except for the omission of a direction to do so given by a majority of the bond-holders after the default occurred. We think this is made, by the contract, a condition precedent to the right of the trustees to postpone the time for the payment of interest.

The fact that the mortgage in question covers all of the property of the corporation, and must eventually be enforced for the benefit of its beneficiaries equally, would seem to subject the motives of the plaintiff in bringing this suit to the imputation of attempting to extort payment of his coupons from the company, to the detriment of his associates; but this constitutes no defense to the action. The remedy of the bond-holders against such an effort, if any there is, must be found in the exercise by the trustees of the power conferred upon them by the mortgage to take possession of the property covered thereby, and use its proceeds for the common benefit of all bond and coupon holders.

The judgments of the common pleas and general term should, therefore, be reversed, and that of the trial court affirmed, with costs.

NEGOTIABILITY OF COUPONS, GENERALLY: See note to *Evertson v. National Bank*, 23 Am. Rep. 15-17; and extended note to *Morris Canal etc. Co. v. Fisher*, 64 Am. Dec. 428-445.

WHERE COUPONS REFER TO BONDS, HOLDER IS CHARGEABLE WITH NOTICE of all the bonds contain: Note to *Morris Canal etc. Co. v. Fisher*, 64 Am. Dec. 432 et seq.; and see also the note to *De Voss v. Richmond*, 98 Id. 664 et seq., on the subject of municipal bonds.

COLLYER v. COLLYER.

[110 NEW YORK, 481.]

WILL IS PRESUMED TO HAVE BEEN DESTROYED, WITH INTENT TO REVOKE IT, from proof that it cannot be found after testator's death.

ONE WHO SEEKS TO ESTABLISH A LOST OR DESTROYED WILL ASSUMES THE BURDEN of overcoming by adequate proof the presumption that it has been destroyed, *animo revocandi*.

PRESUMPTION THAT A WILL WHICH CANNOT BE FOUND WAS DESTROYED ANIMO REVOCANDI IS NOT OVERCOME by proof that persons injuriously affected by the will had opportunities to destroy it. The facts and cir-

cumstances must be sufficient to establish that the will was actually fraudulently destroyed.

COSTS AGAINST THE UNSUCCESSFUL PROPONENT OF A WILL may be awarded, in the discretion of the surrogate, under the statutes of New York.

APPLICATION to admit to probate the will of Elizabeth Collyer, alleged to have been lost or destroyed. The surrogate denied the probate, and his action was affirmed by the general term.

Dennis McMahon, for the appellant.

Seaman Miller, for the respondents.

EARL, J. Elizabeth Collyer died in Westchester County on the fourth day of March, 1883, possessed of a considerable estate. George B. Collyer, claiming that she had made a will devising and bequeathing all her estate to him, and appointing him the sole executor thereof, and alleging that the will had been fraudulently destroyed, instituted this proceeding in the surrogate's court, under section 2621 of the code, to establish the will. The administrator and next of kin and heirs of the deceased were made parties to the proceeding and they opposed and contested probate of the will.

The petitioner, George B. Collyer, gave evidence tending to show that in 1863 the deceased made such a will as he claims; that she left the will in the custody of the lawyer who drew it until about the year 1877, when she took the will into her own possession, and soon thereafter exhibited a folded paper which she claimed was her will. Witnesses were called on behalf of the petitioner, who testified to declarations made by the deceased at various times, but not later than seven months prior to her decease, to the effect that she had made a will giving all her estate to her brother George; and witnesses were called on behalf of the contestants, who testified to declarations made by her in the years 1882 and 1883, the last in February of the latter year, to the effect that she was displeased with the treatment received by her from her brother George; that she had changed her intention in reference to him, and had destroyed her will.

Upon all the evidence, the surrogate found, as matter of fact, that there was a want of sufficient legal proof that the deceased ever executed a will; that there was a want of sufficient legal proof of the contents of any will; that at the time of her death she left no will in existence, and that no will of hers was fraudulently destroyed in her lifetime; and he held, as

matter of law, that the alleged will should not be established or admitted to probate as a lost or destroyed will, and that the deceased died intestate.

The decision of the surrogate was affirmed at the general term, upon the ground, as appears from the opinion there pronounced, that there was not sufficient proof that the alleged will was in existence at the time of the decease of Mrs. Collyer, or that it was fraudulently destroyed in her lifetime. Without passing upon the other grounds upon which the surrogate based his decision, we agree with the general term. It is provided in the Revised Statutes (2 R. S., c. 6, tit. 1, art. 8, sec. 42) as follows: "No will, except in the cases hereinafter mentioned, nor any part, shall be revoked or altered, otherwise than by some other will in writing or some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same by the testator himself, or by another person in his presence, by his direction or consent; and when so done by another person, the direction and consent of the testator and the fact of such injury or destruction shall be proved by at least two witnesses." The claim of the petitioner is, that the will of Mrs. Collyer was not destroyed by herself, but by some other person without her knowledge or consent. This claim is wholly unsupported by proof. No witness was called who had seen the will since 1877, and there is no evidence whatever that the will was in existence during the last seven months of her life, and the most diligent search failed to disclose any trace of it after her death. The evidence simply shows that several of her next of kin were about her for a short time before her death and in her house afterward, and thus may have had opportunity to find and destroy the will. But all such persons were called as witnesses, and positively denied any knowledge of the will or any interference therewith, and thus there was not enough evidence even to raise a fair suspicion that the will had been fraudulently destroyed.

There is no direct proof that Mrs. Collyer destroyed her will. But the proof that the will was not found after her death is sufficient proof that she destroyed it *animo revocandi*. When a will previously executed cannot be found after the death of the testator, there is a strong presumption that it

was revoked by destruction by the testator, and this presumption stands in the place of positive proof: *Betts v. Jackson*, 6 Wend. 173; *Knapp v. Knapp*, 10 N. Y. 276; *Schultz v. Schultz*, 35 Id. 653; 91 Am. Dec. 88; *Hatch v. Sigman*, 1 Demarest, 519. He who seeks to establish a lost or destroyed will assumes the burden of overcoming this presumption by adequate proof. It is not sufficient for him to show that persons interested to establish intestacy had an opportunity to destroy the will. He must go further, and show, by facts and circumstances, that the will was actually fraudulently destroyed. In *Loxley v. Jackson*, 3 Phillim. 126, the will was last seen in a small box in the bedroom of the deceased, but was not found after her death, and it was held that the presumption of law was, that the testatrix destroyed it *animo revocandi*, that the law did not presume fraud, and that the burden of proof was on the party claiming under the will. In *Betts v. Jackson*, *supra*, a will was duly executed and in the custody of the testator for five years afterward, and within ten months previous to his decease, but could not be found after his decease, and it was held that the legal presumption was that the testator had destroyed it *animo revocandi*, although it appeared that within a fortnight before his death he applied to a scrivener, who had drawn a codicil, to draw another codicil to his will, which, however, was not drawn, nor was the will at the time produced to the scrivener. In *Knapp v. Knapp*, *supra*, it was held that proof that a will, executed by a deceased person, was said by him, a month previous to his death, to be in his possession, in a certain desk at his house, that he then was very aged and feeble, that his housekeeper was a daughter having an interest adverse to the will, and that the same could not be found on proper search three days after his death, is not sufficient evidence of its existence at the testator's death, or of a fraudulent destruction in his lifetime, to authorize parol proof of its contents. The authorities are uniform, and no further citations are needed.

As the evidence on the part of the petitioner wholly failed to make out his case, he was not harmed by any of the evidence offered and received on behalf of the contestants to which he makes objections, and such objections need not therefore be considered.

The surrogate, in his decree, allowed costs against the petitioner personally to the several contestants; and he complains of this, relying for his protection upon subdivision 3 of

section 2558 of the code, which is as follows: "When the decree is made upon a contested application for probate or revocation of probate of a will, costs, payable out of the estate or otherwise, shall not be allowed to an unsuccessful contestant of the will, unless he is a special guardian for an infant, appointed by the surrogate, or is named as an executor in a paper proposed by him in good faith as the last will of the decedent." That provision plainly relates to an unsuccessful contestant of a will, and has no concern whatever with a proponent of a will. The petitioner sought to establish a will in which he was the sole beneficiary; and, by the same section, the surrogate was clothed with discretion, not reviewable here, to award costs against him personally in favor of one or all of the contestants.

Our conclusion, therefore, is, that the judgment appealed from should be affirmed, with one bill of costs to the respondents.

WHERE WILL IS DESTROYED OR MUTILATED, TESTATOR IS PRESUMED to have done the act *animo revocandi*: *Bennett v. Sherrod*, 3 Ired. 303; 40 Am. Dec. 410.

WHERE CONTEST OF PROBATE OF WILL WAS IN GOOD FAITH, and on probable cause, costs may be allowed both parties: *Moore v. Alden*, 80 Me. 301; *ante*, p. 203.

MATTER OF MACKAY.

[110 NEW YORK, 611.]

WILL. — SUBSCRIBING WITNESSES TO A WILL MUST SEE THE TESTATOR'S SIGNATURE at the time when they attest it. It is not sufficient for him to send for the witnesses, explain that he wanted them to sign his will, and obtain their signatures as attesting witnesses, if the will is so folded that they cannot see whether he has signed it or not.

APPLICATION for probate of a paper alleged and purporting to be the last will of James Mackay. Probate denied by the surrogate, whose decree was affirmed by the general term.

Louis Hasbrouck, for the appellant.

William H. Sawyer, for the respondent.

EARL, J. The subscribing witnesses came to the dwelling-house of the deceased by previous appointment, and while seated at his writing-desk, he said to them: "Gentlemen, what I sent for you for was to sign my last will and testament."

Thereupon he took from his writing-desk the instrument offered for probate, and, laying it before the witnesses, said: "It is now all ready awaiting your signatures." He then presented the instrument to the witness McCarrier for his signature, and he signed it, saying as he did so: "I am glad, Father Mackay, you are making your will at this time; I don't suppose it will shorten your life any"; to which he replied, Yea, he wanted it done and off his mind; and then the witness Mulligan, who had joined in this conversation, signed the instrument as a witness. At the time of exhibiting the instrument to the subscribing witnesses he told them it was his will, but he handed it to them so folded that they could see no part of the writing except the attestation clause, and they did not see either his signature or seal. There would undoubtedly have been a formal execution of the will in compliance with the statutes if the witnesses had, at the time, seen the signature of the testator to the will. Subscribing witnesses to a will are required by law, for the purpose of attesting and identifying the signature of the testator, and that they cannot do unless at the time of the attestation they see it. And so it has been held in this court. In *Lewis v. Lewis*, 11 N. Y. 221, where the alleged will was not subscribed by the testator in the presence of the witnesses, and when they signed their names to it, it was so folded that they could not see whether it was signed by him or not, and the only acknowledgment or declaration made by him to them, or in their presence, as to the instrument was, "I declare the within to be my will and deed," it was held that this was not a sufficient acknowledgment of his subscription to the witnesses, within the statute. In that case, Allen, J., writing the opinion, said: "A signature neither seen, identified, or in any manner referred to as a separate and distinct thing, cannot, in any just sense, be said to be acknowledged by a reference to the entire instrument by name to which the signature may or may not be at the time subscribed." In *Mitchell v. Mitchell*, 16 Hun, 97, affirmed in this court in 77 N. Y. 596, the deceased came into a store where two persons were, and produced a paper and said: "I have a paper which I want you to sign." One of the persons took the paper, and saw what it was, and the signature of the deceased. The testator then said: "This is my will; I want you to witness it." Both of the persons thereupon signed the paper as witnesses under the attestation clause. The deceased then took the paper and said: "I declare this to be my last

will and testament," and delivered it to one of the witnesses for safe-keeping. At the time when this took place the paper had the name of the deceased at the end thereof. It was held that the will was not properly executed, for the reason that one of the witnesses did not see the testator's signature, and as to that witness, there was not a sufficient acknowledgment of the signature, or a proper attestation. It is true that in *Willis v. Mott*, 86 N. Y. 486, 491, Davies, C. J., writing the opinion of the court, said, that "the statute does not require that the testator shall exhibit his subscription to the will at the time he makes the acknowledgment. It would therefore follow that when the subscription is acknowledged to an attesting witness it is not essential that the signature be exhibited to the witness." This is a mere *dictum*, unnecessary to the decision in that case, and therefore cannot have weight as authority. The formalities prescribed by the statute are safeguards thrown around the testator to prevent fraud and imposition. To this end the witnesses should either see the testator subscribe his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature. Otherwise, imposition might be possible, and sometimes the purpose of the statute might be frustrated.

We think, therefore, that probate of the will was properly refused, and that the judgment below should be affirmed, without costs.

SIGNING AND ATTESTING WILLS: See note to *Maynard v. Vinton*, 60 Am. Rep. 235, and to *Waller v. Waller*, 42 Am. Dec. 571.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

STUMORE v. SHAW.

[68 MARYLAND, 11.]

VERDICT — NO GROUND FOR REVERSAL. — If, in view of finding by jury, certain legal propositions embodied in requests to charge become mere abstractions, their rejection could work no injury to the party excepting, and constitutes no ground for reversing the verdict.

EXPERT TESTIMONY IS NOT ADMISSIBLE UPON QUESTION which the court or jury can decide upon the facts. When the relation of facts and their probable results can be determined without special skill or study, the facts themselves must be given in evidence, and the conclusions and inferences must be drawn by the jury.

EVIDENCE. — RULE THAT WHERE WHOLE OF CORRESPONDENCE IS CALLED FOR, ALL OF IT MUST BE ADMITTED, HAS NO APPLICATION to a case where one party attempts to fix a liability for negligence upon another, and offers in evidence against him certain letters written by the former to the latter after the transactions between them have come to an end. The duty of the party accused of negligence being then discharged, and his liability for negligence, if he had been guilty of any, being then fixed, neither his rights nor his liability could be affected by any communication he may have subsequently received from the party seeking to hold him liable.

Robert H. Smith and Alfred S. Niles, for the appellant.

John H. Thomas, for the appellee.

MILLER, J. The plaintiff in this case was a ship-broker in Montreal, and the defendant a ship-owner in London. The suit is to recover for services rendered and advances made by the plaintiff in the disbursement and on account of two steamships, the Lilburn Tower and Maulkins Tower, consigned to the plaintiff by the defendant in June, 1884. The amount

claimed, including commissions, was £646 9s. 5d. For this sum the plaintiff drew a draft on the defendant, which the latter refused to accept or pay. The declaration contains the common counts only. The plea was *non assumpsit*, and the verdict was in favor of the plaintiff for the full amount of his claim.

The steamers were sent to Montreal, the one laden with iron rails, and the other in ballast, with the expectation of receiving return cargoes, chiefly of cattle and grain; and the defense set up at the trial, stated in general terms, was misconduct, neglect of duty, and violation of instructions on the part of the plaintiff in regard to procuring this freight in Montreal.

There were several exceptions to the rulings of the court as to the admissibility of evidence, and there was one as to instructions to the jury. The latter will be noticed first.

1. There is no evidence legally sufficient to show that the defendant was induced to send either of his steamships to Montreal by any untrue representations made to him by the plaintiff. Hence there is no error in granting the plaintiff's first prayer, and no objection was made to it by appellant's counsel in argument.

As to the defendant's three prayers which were rejected, it appears to us plain that discussion of the legal propositions they contain is needless, in view of the instructions given by the court, and the verdict of the jury under them. The court of its own motion instructed the jury "that if they find that the plaintiff in the transaction of the defendant's business violated his instructions or failed to give him timely information of facts important for him to know, or to exercise that degree of fidelity, skill, and diligence which similar agents ordinarily employ, or might reasonably be expected to employ, under similar circumstances, and that the defendant suffered loss in consequence thereof, then the defendant is entitled to have recouped from the plaintiff's claim such damages, if any, as the defendant may have actually sustained thereby."

This placed the case before the jury in a light more favorable to the defendant perhaps than the proof warranted, and the plaintiff excepted to it on that ground. The court, however, adhered to the instruction, and the plaintiff thereupon offered his third prayer, to the effect that if the jury think they ought to make any deduction by way of damages from the plain-

tiff's claims, it should only be for such as the defendant may have actually sustained by violation of instructions or neglect of duty as stated in the court's instruction, if they believe there was any such violation or neglect, and such amount, if any, as they may think ought to be deducted from the commissions charged. The court granted this prayer also as an addition to or in explanation of its own instruction; and being thus instructed, the jury by their verdict made no abatement whatever from the plaintiff's claim, but gave him the whole of it, with interest. From this the inevitable conclusion is, that they found from the evidence that there had been in fact no neglect or violation of instructions by the plaintiff, and that he had transacted the defendant's business with reasonable skill, fidelity, and diligence. This verdict exonerates the plaintiff from all blame, and that being the state of the case, there is no occasion to consider the question whether if there had been any violation of instructions, or gross negligence, or misconduct on the part of the agent, the jury would have been bound to reject his commissions *in toto*, and be at liberty also to recoup the damages suffered by reason of such negligence and misconduct, as stated in the defendant's first and second prayers, or whether the proposition contained in his third prayer is correct. In view of this finding by the jury, these legal propositions become mere abstractions. The appellant suffered no injury by their rejection, even if they may have been (a point on which we express no opinion) abstractly right.

2. The Lilburn Tower sailed from Newport, England, for Montreal on the 11th of June, loaded with a cargo of iron rails. The usual time for her voyage was from twelve to fourteen days. The plaintiff, being advised of the probable date of her departure, made contracts in Montreal with shippers of grain and cattle for a return cargo, "for June loading," by which is meant that the shippers could cancel the contracts if the vessel was not ready to receive their shipments during the month of June. The steamer was delayed on her voyage, and did not arrive until the 28th of June, and not being ready to receive her return cargo during that month, the cattle-men refused to ship at the contract rates, or to ship at all except at a greatly reduced rate of freight. The plaintiff accepted the reduced rate, but the undisputed testimony is, that he obtained the highest rate then obtainable in that port for such cargo. The objection of the defendant is, that the plaintiff made these

contracts with too early a canceling date, and was therefore chargeable with negligence. To sustain this objection, he called to the stand several Baltimore ship-brokers and shipping merchants who were acquainted with and had had experience in such business in Baltimore, and putting to them the hypothesis that the Lilburn Tower, loaded with iron rails, sailed from Newport, England, for Montreal on the 11th of June; that it ordinarily requires from twelve to fourteen days to make the passage; that upon her arrival she would have to discharge her cargo, and then be fitted to load grain in her hold and cattle on deck, — proposed to ask each of them whether or not under such circumstances it would have been, — 1. Reasonably prudent for a broker, as consignee of said vessel, to engage outward cargo from Montreal for June loading? 2. Would it, or not, be prudent for such a broker to engage grain and cattle for June loading? and 3. Whether or not it was possible for that vessel to be loaded and sail from Montreal in June. Upon objection made by the plaintiff, the court refused to allow these questions to be put, and to these rulings the defendant excepted.

There is a general concurrence of authority and decisions in support of the proposition that expert testimony is not admissible upon a question which the court or jury can themselves decide upon the facts; or, stated in other words, if the relation of facts and their probable results can be determined without special skill or study, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury: *Lawson on Expert and Opinion Evidence*, 203; *Rogers on Expert Testimony*, 11. And this court, in considering this question in a recent case, has said: "It is proper to lay before the jury all the facts necessary to enable them to form a judgment on the matters in issue; and when the subject under investigation requires special skill and knowledge, they may be aided by the opinions of persons whose pursuits or studies or experience have given them a familiarity with the matter in hand. But where the question can be decided by such experience and knowledge as are ordinarily found in the common business of life, the jury are competent to draw the proper inferences from the facts, without hearing the opinion of witnesses": *Baltimore and Yorktown Turnpike Road Co. v. Leonhardt*, 66 Md. 77, 78. In our opinion, the present case is within the rule thus stated. If, in addition to the facts stated in the hypothetical question, it had been proved how

long it usually took to unload such a cargo, and to fit up a vessel for the reception of grain and cattle, and what were the facilities for such unloading and refitting in Montreal, the jury, with these facts before them, would have been quite competent to determine whether it was prudent, or reasonably prudent, for the plaintiff to make the contracts complained of, and whether it was possible for the steamer to have been loaded, and to have sailed in June. These additional facts could have been easily proved, so as to place all the circumstances in view of which the plaintiff acted clearly before the jury; and if that had been done, they would have required no aid from the opinions of others in drawing the inference as to whether he acted prudently or otherwise. No question of science or nautical skill was involved, nor did it require a course of previous habit or study in order to attain sufficient knowledge to answer these questions. Waiving, then, consideration of other reasons urged in argument in support of these rulings, we affirm them on the simple ground that this is not a case for the admission of expert testimony.

3. The remaining question arises thus: The telegrams by cable and letters by mail between the parties had been offered in evidence, subject to exception; and after the testimony had been closed, the plaintiff prayed the court to withdraw from the consideration of the jury all of the letters from the defendant to the plaintiff which were received by the plaintiff after the sailing of the two ships from Montreal. This prayer the court granted, the defendant having declined a modification thereof, embracing similar letters written by the plaintiff. The undisputed facts are, that both vessels were loaded and sailed on the 10th of July. At that time, everything in regard to providing them with cargoes had been done, and the vessels had left Montreal, homeward bound. The plaintiff could not then recall them in obedience to any letter he may have afterwards received from the defendant. His duty had then been discharged, and his liability for negligence, if he had been guilty of any, was then fixed, and neither his rights nor his liability could be affected by any communication he may have subsequently received from the defendant. The simple statement of the facts places the correctness of this ruling beyond the pale of argument. It is not a case where the rule that where the whole of a correspondence is called for, the whole of it must be admitted, has any application.

Judgment affirmed.

REFUSAL OF INSTRUCTIONS WHICH AMOUNT TO MERE ABSTRACT PROPOSITIONS OF LAW is not erroneous: *Gunn v. Howell*, 35 Ala. 144; 73 Am. Dec. 484; *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478.

EXPERT EVIDENCE, WHEN ADMISSIBLE GENERALLY: See the note to *Hammond v. Woodman*, 66 Am. Dec. 228-246. In *Hurt v. St. Louis etc. Ry Co.*, 94 Mo. 255, 4 Am. St. Rep. 374, it is held that opinions of experts are not admissible on matters with which the jury may be supposed to be equally conversant.

WHERE PART OF CORRESPONDENCE IS ADMITTED, party is entitled to have the rest of it admitted in evidence: See note to *Rouse v. Whited*, 82 Am. Dec. 343, 345, discussing this topic.

COLEMAN v. APPLLEGARTH.

[68 MARYLAND, 21.]

CONTRACTS. — UNILATERAL CONTRACT IN WRITING SIMPLY GIVING OPTION to purchase land within a specified time, for a given price, is binding upon the party only who signs it, and is binding upon him only for the time stipulated for the exercise of the option.

GENERAL RULE THAT TIME IS NOT DEEMED BY COURTS OF EQUITY as being of the essence of contracts has well-defined exceptions, which are as constantly recognized as the rule itself. And when the parties have expressly treated time as of the essence of the contract, or if it necessarily follows from the nature and circumstances of the agreement that it should be so regarded, such courts will not lend their aid to enforce it specifically, regardless of the limitation of time.

VERBAL AGREEMENT OR PROMISE TO EXTEND TIME FOR EXERCISE OF OPTION TO BUY, unsupported by a consideration, is a mere *nudum pactum*, and is not enforceable. It operates as a mere continuing offer until it should be withdrawn, or otherwise ended by the person making it, who is entirely at liberty at any time, before acceptance, to withdraw; and the subsequent sale and transfer of the property to a third person has the effect of at once terminating the offer.

BILL for the specific performance of a contract. The opinion states the case.

Richard Bernard, for the appellant.

Sebastian Brown and Rufus W. Applegarth, for the appellees.

ALVEY, C. J. Coleman, the appellant, filed his bill against Applegarth and Bradley, the appellees, for a specific performance of what is alleged to be a contract made by Applegarth with Coleman for the sale of a lot of ground in the city of Baltimore. The contract upon which the application is made, and which is sought to be specifically enforced, reads thus: "For and in consideration of the sum of five dollars paid me, I do hereby give to Charles Coleman the option of

purchasing my lot of ground, northwest corner, etc., assigned to me by Wright and McDermot, by deed dated, etc., subject to the ground-rent therein mentioned, at and for the sum of \$645 cash, at any time on or before the first day of November, 1886." It was dated the 3d of September, 1886, and signed by Applegarth alone.

The plaintiff, Coleman, did not exercise his option to purchase within the time specified in the contract; but he alleges in his bill that Applegarth, after making the contract of the 3d of September, 1886, and before the expiration of the time limited for the exercise of the option, verbally agreed with the plaintiff to extend the time for the exercise of such option to the 1st of December, 1886. It is further alleged that, about the 9th of November, 1886, without notice to the plaintiff, Applegarth sold, and assigned by deed, the lot of ground to Bradley, for the consideration of \$700; and that subsequently, but prior to the 1st of December, 1886, the plaintiff tendered to Applegarth, in lawful money, the sum of \$645, and demanded a deed of assignment of the lot of ground, but which was refused. It is also charged that Bradley had notice of the optional right of the plaintiff at the time of taking the deed of assignment from Applegarth, and that such deed was made in fraud of the rights of the plaintiff under the contract of September 3, 1886. The relief prayed is, that the deed to Bradley may be declared void, and that Applegarth may be decreed to convey the lot of ground to the plaintiff upon payment by the latter of the \$645, and for general relief.

The defendants, both Applegarth and Bradley, by their answers, deny that there was any binding contract, or optional right, existing in regard to the sale of the lot, as between Applegarth and the plaintiff, at the time of the sale and transfer of the lot to Bradley; and the latter denies all notice of the alleged agreement for the extension of time for the exercise of the option by the plaintiff; and both defendants rely upon the statute of frauds as a defense to the relief prayed.

The plaintiff was examined as a witness in his own behalf, and he also called and examined both of the defendants as witnesses in support of the allegation of his bill. But without special reference to the proof taken, the questions that are decisive of the case may be determined upon the facts as alleged by the bill alone, in connection with the contract ex-

hibited, as upon demurrer; such facts being considered in reference to the grounds of defense interposed by the defendants.

The contract set up is not one of sale and purchase, but simply for the option to purchase within a specified time, and for a given price. It was unilateral and binding upon one party only. There was no mutuality in it, and it was binding upon Applegarth only for the time stipulated for the exercise of the option. After the lapse of the time given, there was nothing to bind him to accept the price and convey the property; and the fact that this unilateral agreement was reduced to writing added nothing to give it force or operative effect beyond the time therein limited for the exercise of the option by the plaintiff. It is quite true, as contended by the plaintiff, that, as a general proposition, time is not deemed by courts of equity as being of the essence of contracts; and that, in perfected contracts, ordinarily, the fact that the time for performance has passed will not be regarded as a reason for withholding specific execution. But while this is the general rule upon the subject, that general rule has well-defined exceptions, which are as constantly recognized as the general rule itself. If the parties have, as in this case, expressly treated time as of the essence of the agreement, or if it necessarily follows from the nature and circumstances of the agreement that it should be so regarded, courts of equity will not lend their aid to enforce specifically the agreement, regardless of the limitation of time: 2 Story's Eq. Jur., sec. 776. Here, time was of the very essence of the agreement, the nominal consideration being paid to the owner for holding the property for the specified time, subject to the right of the plaintiff to exercise his option whether he would buy it or not. When the time limited expired, the contract was at an end, and the right of option gone, if that right has not been extended by some valid binding agreement that can be enforced. This would seem to be the plain dictate of reason, upon the terms and nature of the contract itself; and that is the plain result of the decision of this court, made in respect to an optional contract to purchase, in the case of *Maughlin v. Perry*, 35 Md. 352, 359, 360.

As must be observed, it is not alleged or pretended that the plaintiff attempted to exercise his option, and to complete a contract of purchase, within the time limited by the written agreement of the 3d of September, 1886. But it is alleged

and shown that before the expiration of such time, the defendant Applegarth verbally agreed or promised to extend the time for the exercise of the option by the plaintiff from the 1st of November to the 1st of December, 1886; and that it was within this latter or extended period, and after the property had been sold and conveyed to Bradley, that the plaintiff proffered himself ready to accept the property and pay the price therefor. It is quite clear, however, that such offer to accept the property came too late. There was no consideration for the verbal promise or agreement to extend the time, and such promise was a mere *nudum pactum*, and therefore not enforceable, to say nothing of the statute of frauds, which has been invoked by the defendants. After the 1st of November, 1886, the verbal agreement of Applegarth operated simply as a mere continuing offer at the price previously fixed, and which offer only continued until it should be withdrawn or otherwise ended by some act of his; but he was entirely at liberty at any time, before acceptance, to withdraw the offer; and the subsequent sale and transfer of the property to Bradley had the effect at once of terminating the offer to the plaintiff: Pomeroy on Specific Performance, secs. 60, 61.

The principles that govern in cases like the present are very fully and clearly stated by the English court of appeal in chancery, in the case of *Dickinson v. Dodds*, 2 Ch. Div. 463. That case, in several of its features, is not unlike the present. There the owner of property signed a document which purported to be an agreement to sell it at a fixed price, but added a post-script, which he also signed, in these words: "This offer to be left over until Friday, nine o'clock, A. M.,"—two days from the date of the agreement. Upon application of the party, who claimed to be vendee of the property, for specific performance, it was held, upon full and careful consideration by the court of appeal, that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer. In the course of his judgment, after declaring the written document to be nothing more than an offer to sell at a fixed price, Lord Justice James said: "There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until nine o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same

opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until nine o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear, settled law, on one of the clearest principles of law, that this promise, being a mere *nudum pactum*, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. That being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, 'Now I withdraw my offer.' It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing." And Lord Justice Mellish was quite as explicit in stating his judgment, in the course of which he said: "He was not in point of law bound to hold the offer over until nine o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds made the offer to Dickinson, and had given him till Friday morning at nine o'clock to accept it, still, in point of law, that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds." And further on he says: "If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the per-

formance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted, it is impossible that it can then be accepted; so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer; and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson.

In this case, the plaintiff admits that, at the time he proffered to Applegarth acceptance of the previous offer to sell at the price named, he was aware of the fact that the property had been sold to Bradley. It was therefore too late for him to attempt to accept the offer, and there was not, and could not be made by such proffered acceptance, any binding contract of sale of the property.

It follows that the decree of the court below, dismissing the bill of the plaintiff, must be affirmed.

Decree affirmed.

TIME IS OF ESSENCE OF CONTRACTS, WHEN: *Thornton v. Sheffield*, 84 Ala. 109; 5 Am. St. Rep. 337, and note; *Sanford v. Weeks*, 38 Kan. 319; 5 Am. St. Rep. 748.

ORAL EVIDENCE IS NOT ADMISSIBLE TO SHOW modification of written offer to sell land, so as to extend the time limited for its acceptance: *Atlee v. Bartholomew*, 69 Wis. 43; 5 Am. St. Rep. 103.

CONTRACT FOR SALE OF LAND MUST BIND BOTH PARTIES, OR IT CAN BIND NEITHER: *Atlee v. Bartholomew*, 69 Wis. 43; 5 Am. St. Rep. 103.

HITCHINS v. MAYOR ETC. OF FROSTBURG.

[68 MARYLAND, 100.]

MUNICIPAL CORPORATIONS. — POWER CONFERRED BY CHARTER UPON MUNICIPAL CORPORATION TO OPEN, GRADE, and pave streets, and to construct such gutters and sewers as in its judgment the public convenience may require, and to repair the same whenever needed, is discretionary or quasi judicial, which the corporate authorities cannot be compelled to execute unless the terms of the statute are imperative. But any particular plan that may be adopted must be a reasonable one, and the manner of its execution thence becomes, with respect to the rights of the citizen, a mere ministerial duty; and for any negligence and unskillfulness in the execution or construction of the work, whereby injury is inflicted upon private right, the municipality will be held responsible.

MUNICIPAL CORPORATION INCURS LIABILITY when the property of private persons is flooded, either directly or by water being set back, when this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts, or sewers, or of the negli-

gent failure to keep the same in repair, and free from obstruction, and this whether the lots are below the grade of the streets or not.

TO RENDER MUNICIPAL CORPORATION LIABLE IN ACTION FOR DAMAGES TO PLAINTIFF'S PROPERTY, caused by the overflow of surface water, resulting from the defective condition of a sewer constructed to receive and carry off such water, the jury must find that the defendant had notice, either direct or inferential by lapse of time, of the defective and insufficient condition of the sewer, and the injury resulting therefrom.

MUNICIPAL CORPORATION CANNOT, IN CONSTRUCTION OF PUBLIC WORK, divert the flow of surface water, gather it in volume and force, and empty it upon private property, without becoming liable therefor. It is the duty of the corporation to provide by adequate means for passing off the water thus concentrated in volume, so as to avoid doing damage to private property; and if it allows the water to accumulate in large quantities at the mouth of a sewer, and thence flow back upon private property, this constitutes a nuisance, and for neglect of the duty to remove it, the corporation is liable.

IN ACTION AGAINST MUNICIPAL CORPORATION FOR DAMAGES CAUSED BY OVERFLOW OF SURFACE WATER into the plaintiff's cellar, if the injury complained of was sustained by reason of the backing of the water from the mouth of a sewer or culvert constructed by the defendant, where it had been brought in large quantities by artificial drains, and such backing and overflow were caused by the defective and insufficient sewer or culvert, and would not have occurred but for that cause, then the fact that the floor of the plaintiff's cellar had been lowered by a prior owner will afford no justification to the defendant for the defective and insufficient sewer.

PLEADING AND PRACTICE — WHERE INSTRUCTION GIVEN FOR GUIDANCE OF JURY MAKES NO REFERENCE TO PLEADINGS in the case, the jury are not required to look at them to ascertain how they are to find, and counsel for the plaintiff will not be permitted to read the declaration to the jury and argue that its allegations were sustained by the evidence in the case. To permit this would be simply to allow an appeal from the court to the jury.

WHETHER JURY SHOULD TAKE WITH THEM INTO JURY-ROOM PLEADINGS in any case, is matter within the discretion of the trial court, and is not the subject of review on appeal.

William Brace, for the appellants.

William C. Devecmon and Ferdinand Williams, for the appellee.

ALVEY, C. J. This action was brought to recover damages alleged to have been suffered by reason of the backing and overflow of water, mud, etc., upon the property of the plaintiffs, caused, as it is alleged, by a badly constructed and insufficient underground sewer, in the town of Frostburg. It is alleged that, in the grading of two of the streets of the town, the surface water was diverted from its natural course and flow, and collected into artificial drains or gutters in large volumes, and thereby caused to flow to a point in Bowery

Street opposite and near to the property of the plaintiffs, on the north side of that street, where the defendant caused to be constructed a sewer or culvert under and across Bowery Street, by which such water was designed to be carried off and emptied on the south side of said street; but by reason of the negligent, unskillful, and defective construction and maintenance of such culvert, the same was insufficient, and failed to carry off the water conducted to the mouth thereof, and consequently the water and *débris* so collected and conducted were backed up and made to overflow upon the property of the plaintiffs, thereby causing great injury. The case was tried upon the general issue plea of not guilty.

By the charter of the town, full authority is conferred upon the mayor and councilmen, to open, grade, and pave streets, and to construct such gutters and sewers as in their judgment the public convenience may require, and to repair the same whenever needed. They are also empowered to remove all nuisances and obstructions from the streets, and they are clothed with power to pass all such ordinances as may be deemed beneficial to the town, and necessary for the safety and protection of person and property of the inhabitants thereof: Acts 1870, c. 77; 1878, c. 255.

The evidence shows that the town of Frostburg is built on the slope of a mountain, and the grades of its streets are in many places and in different directions quite steep. Charles Street has a heavy down grade to the point where it joins or intersects Bowery Street, and the latter has a considerable ascent in both directions, east and west, from the point where such streets join at right angles. Artificial gutters have been made on the north side of Bowery Street, and on the east side of Charles Street, whereby the surface water, which flows on both streets in large quantities during heavy rainfalls, is collected and made to flow in the artificial gutters to the mouth of the sewer constructed diagonally across Bowery Street at the junction of Bowery and Charles streets. It is shown by the proof on the part of the plaintiffs, and indeed not controverted by the defendant, that this sewer or culvert was not of sufficient capacity, even if it had been otherwise well constructed, to carry off the water frequently flowing to it; but that, according to the proof offered by the plaintiffs, it was so unskillfully, negligently, and defectively constructed that the flow of water was obstructed, and consequently dammed up, and made to overflow the adjoining premises of the plain-

tiffs, sometimes to the depth of two feet or more, carrying dirt and *débris* upon the same, thereby doing serious damage to the property. Proof was also adduced to show that the defendant was for several years before suit brought well aware of the defective and insufficient condition of the sewer, and of the injury suffered therefrom by the plaintiffs, but that it had failed to take any steps to remedy the defect. On the part of the defendant, proof was given to controvert in several important particulars the evidence on the part of the plaintiffs. The defendant also offered proof to show that the prior owner of the plaintiffs' property cut down and lowered the floor of the cellar of the house, and removed the earth between the house and the street, so that when the water was raised a few inches in the gutter on the street it ran into the cellar or basement of the house. This, however, was controverted by testimony for the plaintiffs.

Upon the whole evidence, both parties applied to the court for instructions to the jury. But of the prayers offered, the one single prayer by the plaintiffs, and all those by the defendant except the first and fourth, were rejected. It was therefore upon the first and fourth prayers of the defendant, given as instructions, that the case was placed before the jury. The plaintiffs excepted to the refusal to grant their one prayer, and to the granting of the two prayers on the part of the defendant. And this court is now called upon to determine whether there was error, in this ruling upon the prayers, committed by the court below.

Before proceeding to notice particularly the prayers under review, we deem it proper to state the general doctrine of the law upon the subject as we find it laid down by the most approved authorities.

How far the common law, independently of the special provisions of the statute incorporating the defendant, would furnish a remedy against a municipality for an injury such as that complained of here, is a question not necessarily involved in this case. For, as we have seen, the statute, with a view to the improvement and benefit of the town, confers large powers upon the mayor and councilmen with respect to streets, drains, sewers, etc., and also power to remove and prevent nuisances. It is out of these powers, and the manner of their exercise, and the duty resulting therefrom, that the liability here insisted upon arises to the plaintiffs, if it can be maintained at all, in respect to the facts of the case as we have stated them.

In Cooley on Constitutional Limitations, page 248, it is laid down, as the result of the decisions upon the subject, that "the grant by the state to the municipality of a portion of its sovereign powers, and their acceptance for these beneficial purposes, is regarded as raising an implied promise on the part of the corporation to perform the corporate duties; and this implied contract, made with the sovereign power, inures to the benefit of every individual interested in its performance. In this respect these corporations are looked upon as occupying the same position as private corporations, which, having accepted a valuable franchise on condition of the performance of certain public duties, are held to contract by the acceptance for the performance of these duties. In the case of public corporations, however, the liability is contingent on the law affording the means of performing the duty, which, in some cases, by reason of restrictions upon the power of taxation, they might not possess. But assuming the corporation to be clothed with sufficient power by the charter to that end, the liability of a city or village, vested with control of its streets, for any neglect to keep them in repair, or for any improper construction, has been determined in many cases. And a similar liability would exist in other cases where the same reasons would be applicable." In support of this text, the learned author refers to a number of cases; and the principle stated by him is in accord with the decisions of this court in the case of *Baltimore City v. Marriott*, 9 Md. 160, and the recent case of *Taylor v. Cumberland*, 64 Id. 63. And on the next succeeding page of the author just cited, he says: "In regard to all those powers which are conferred upon the corporation, not for the benefit of the general public, but of the corporators,—as, to construct works to supply a city with water, or gas-works, or sewers, and the like,—the corporation is held to a still more strict liability, and is made to respond in damages to the parties injured by the negligent manner in which the work is constructed or guarded," etc.

But notwithstanding this duty and liability of the municipality, in respect to powers delegated, there is a class of powers defined as discretionary or *quasi* judicial, which the corporate authorities cannot be compelled to execute. As, for instance, the opening, widening, or extension of streets, the adoption of a particular grade, or the adoption of any particular plan for improvement, and the like, unless the terms of the statute are imperative. But any particular plan that may

be adopted must be a reasonable one, and the manner of its execution thence becomes, with respect to the right of the citizen, a mere ministerial duty; and for any negligence or unskillfulness in the execution or construction of the work whereby injury is inflicted upon private right, the municipality will be held responsible. This is the principle maintained by the great preponderance of authority; and there is nothing in the case of *City of Cumberland v. Willison*, 50 Md. 138, at all opposed to this principle, as would seem to be supposed by counsel for the defendant. In that case, the authority delegated to the corporation to grade and improve its streets was held to have been properly exercised, with no want of reasonable care and skill. It was not attempted to be shown that the injury complained of had been produced by the want of care and skill in the grading and draining the streets; and there was no question of negligence or want of skill raised in the case. But in the recent case of *Kranz v. Baltimore City*, 64 Md. 491, where the action was brought for injury sustained by a property holder, caused by obstructions in a sewer, and the overflow therefrom, upon the premises of the plaintiff, of water, mud, filth, etc., the result of the bad condition and want of repair of the sewer, this court held that the city was liable, as well for the consequences of the negligent failure to keep the sewer in repair as for negligence and unskillfulness in actually making the repairs. And the general proposition was maintained that where a municipal corporation undertakes, in the discharge of its duties, to construct or repair such a work as a sewer or culvert, it is responsible for damage caused by the negligent, careless, or unskillful manner of performing the work; and 2 Dillon on Municipal Corporations, sec. 1049, is cited with approval. And in that same work, in section 1051, where the author sums up and states the result of the authorities upon the subject of municipal liability for injuries caused by surface water, the following, among other propositions, is formulated: "There is a municipal liability where the property of private persons is flooded, either directly or by water being set back, when this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts, or sewers, or of the negligent failure to keep the same in repair and free from obstruction, and this whether the lots are below the grade of the streets or not." The cases, says Judge Dillon, support this proposition with great unanimity. Of the many cases cited by the author, we

need only refer to those of *Rochester White Lead Co. v. Rochester*, 8 N. Y. 463; 53 Am. Dec. 816; *Barton v. City of Syracuse*, 38 N. Y. 54; *Rowe v. Portsmouth*, 56 N. H. 291; 22 Am. Rep. 464; and *Noonan v. City of Albany*, 79 N. Y. 470; 35 Am. Rep. 540.

Now, with these general principles in view, we will turn to the prayers which form the subject of the first exception by the plaintiffs. And with respect to the one prayer offered by the plaintiffs, we think the court below was right in rejecting it. By that prayer the court was asked to instruct the jury that if they should find that the defendant built the culvert described by the witnesses, and that the same was intended to receive and carry off the surface water flowing through the gutters along Bowery and Charles streets in times of rain, and further find that such sewer or culvert was constructed in such careless, unskillful, and improper manner as, instead of carrying off such water, to cause the same to accumulate in large quantities at the upper end thereof, and from thence to flow back upon the property of the plaintiffs, and injure and damage the same, then the plaintiffs were entitled to recover. This prayer would seem, as a general proposition, to be quite correct as far as it goes; but in view of the evidence in the case, and to avoid misleading the jury, it ought to have gone further, and made reference to the evidence on the part of the defendant, whereby it was sought to show that, by cutting down the cellar floor of the plaintiff's house, the water was in fact let in from the gutter on Bowery Street, which did the injury complained of, and that such injury therefore was not caused by any fault of the defendant in the construction or repair of the sewer. For if it be true that the injury suffered was in fact produced by water thus let in from the gutter, or in any other way than the backing and overflow of the water and *débris* from the mouth of the sewer, caused by the obstruction to its natural flow through such sewer, there would be no ground for recovery, either upon the allegations of the declaration, or the proof produced on the trial. But the prayer is defective in another particular. It wholly omits to submit to the jury to find whether the defendant had notice, either direct, or inferential by lapse of time, of the defective and insufficient condition of the sewer, and the injury resulting therefrom: *Kranz v. Baltimore City*, 64 Md. 491. It is clear, therefore, that there was no error in rejecting the prayer offered by the plaintiffs.

But we think there was error in granting the prayers of the defendant. The first of these prayers, as construed by the court in the course of the argument of counsel to the jury, is based upon the theory that the plaintiffs could not recover, notwithstanding the jury might find from the evidence that the surface water was diverted from its natural flow by the elevation and improvement of the streets, and by the artificial gutters and drains, whereby such surface water was collected in volume, and conducted to the mouth of the sewer opposite the adjoining property of the plaintiffs, whence it could not escape, except by flowing over the premises of the plaintiffs, "if the jury should find that the cause of the back-flow of the water was the elevation of the street, and that said culvert was insufficient in size to carry off all of such water in times of heavy rain; provided the construction of the culvert did not place or leave the said property in a worse condition than if no culvert had been made at all." To this proposition we cannot assent. Reason, as well as authority, would seem clearly to oppose it. We fully agree with Judge Dillon in the principle stated by him in section 1042, volume 2, of his work on municipal corporations. In that section, after referring to the general doctrine that the municipality is not bound to protect from surface water those who may be so unfortunate as to own property below the level of the street, he says: "It is possible there may be no middle ground, but we are unable to assent to the doctrine that by reason of their control over streets, and the power to grade and improve them, the corporate authorities have the absolute and unconditional legal right intentionally to divert the water therefrom as a mode of protecting the streets, and to discharge it, by artificial means, in increased quantities and with collected force and destructiveness, upon the property, perhaps improved and occupied, of the adjoining owner." Here, Bowery Street runs east and west from the mouth of the sewer; and the declivity of the hill, along the side of which that street is made, is to the south. The natural flow of the surface water, therefore, as shown by the proof and the plat exhibited, is to the south. But this natural flow has been interrupted by the elevation of Bowery Street on the south side thereof, and the water has been concentrated in a gutter, and made to flow to the mouth of the sewer, opposite the property of the plaintiffs, on the north side of that street.

If, then, it be true, as it clearly is upon unquestionable

authority (*Lynch v. Mayor*, 76 N. Y. 60; 32 Am. Rep. 271; *Byrnes v. Cohoes*, 67 N. Y. 204; *O'Brien v. City of St. Paul*, 25 Minn. 333; 33 Am. Rep. 470; *Inhabitants of West Orange v. Field*, 37 N. J. Eq. 600; 45 Am. Rep. 670; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552), that the corporation cannot thus divert the flow of surface water, concentrate it in volume and force, and empty it upon private property without becoming liable, it must follow that there is a duty incumbent upon the corporation to provide, by adequate means, for passing off the water thus concentrated in volume, so as to avoid doing damage to private property. The street may be properly graded, and the drains properly made, but the sewer made for the purpose of receiving and carrying off the water cannot be said to be skillfully and carefully constructed or kept in repair, if, from any structural cause, it be insufficient to pass off the water flowing to it through the artificial channels provided. If it be true, as alleged and shown by the plaintiffs, that the surface water was gathered into artificial channels or gutters, and made to flow to the mouth of the sewer, where it was allowed to accumulate in large quantities, and thence flow back upon the property of the plaintiffs, this constituted a nuisance, and as such, it was certainly the duty of the defendant to remove it; and for the neglect of such duty the defendant is liable; for, as was said by the court of appeals for New York, in the case of *Noonan v. City of Albany*, 79 N. Y. 470, 35 Am. Rep. 540: "A municipal corporation has no greater right than an individual to collect the surface water from its lands or streets into an artificial channel, and discharge it upon the land of another; nor has it any immunity from legal responsibility for creating or maintaining a nuisance."

The second prayer granted on the part of the defendant is obnoxious to the same objection that applies to the first. The plaintiffs, and those under whom they claim, had clearly the right to the use and enjoyment of their property in any reasonable way, and for any reasonable purpose, and to make any alteration or new adaptation therein that they deemed proper, without thereby subjecting themselves to the loss of protection to their property from wrongful invasion by inundation or otherwise. Hence it was error to instruct the jury, upon certain enumerated facts, in respect to the lowering of the cellar floor (as was done by granting this prayer), "that the plaintiffs could not recover for any injury to said house

caused by said inflow of surface water to such basement or cellar, notwithstanding the jury might find that the grade of said street, and the insufficient size of said culvert, caused the inflow of said surface water to said basement in time of heavy rain." If the injury complained of was sustained by reason of the backing of the water from the mouth of the culvert, where it had been brought in large quantities by artificial drains, and that such backing and overflow were caused by the defective and insufficient sewer or culvert, and would not have occurred but for that cause, then the fact that the floor of the plaintiffs' cellar had been lowered afforded no justification to the defendant for the defective and insufficient sewer. The cause of the injury was the fault of the defendant, and not of the plaintiffs.

In thus disposing of the two prayers granted for the defendant, we also dispose of the court's construction of the first prayer, as stated in the third exception. And as to the question raised and stated in the fourth exception, we think the court was quite right in ruling as it did. There was no question before the jury as to the want of care or skill in the construction of the gutter or passage-way for the water along Charles Street. Defects and unskillfulness in the construction of that gutter, or negligent failure to keep it in repair, are not alleged as substantive and independent causes of injury; nor was there any proof to show that injury was suffered from that cause.

The second and fifth exceptions present questions of practice. It appears by the second exception that, after the court had ruled upon the prayers for instruction, and granted such as were approved, the counsel for the plaintiffs, in argument to the jury, proceeded to read the declaration. To this the counsel on the other side objected; and upon inquiry by the court as to the purpose of reading the declaration to the jury, the counsel for the plaintiffs said "that his purpose was to call the attention of the jury to the testimony in the case, and to apply such testimony to the allegations of the declaration, and to argue that said allegations, and each of them, were sustained by the evidence in the case, and therefore plaintiffs were entitled to recover, because defendant had not demurred." The court would not permit the declaration to be read, and the plaintiffs excepted.

This court is clearly of opinion that the action of the court below was entirely correct. Otherwise it would be simply an

appeal from the court to the jury. If the jury could be induced to conclude that the allegations of the declaration were sustained by the proof, however inconsequential or immaterial, in a legal point of view, they might be, and notwithstanding the court may have instructed to the contrary of the plaintiffs' contention, upon the theory contended for here, the plaintiffs could recover. Such theory has no foundation in reason, principle, or practice. The instruction given for the guidance of the jury made no reference to the pleadings in the case, and therefore the jury were not required to look at the pleadings to ascertain how they were to find.

In the fifth exception, it is stated that, at the conclusion of the argument, and when the jury were about to retire to consider of their verdict, the counsel for the plaintiffs asked that the jury be allowed to take with them to their room the declaration in the case. This request, upon objection by the defendant, was refused by the court, and the plaintiffs excepted. This refusal by the court, we think, forms no ground of exception by the plaintiffs. It is true, it is said by the late Mr. Evans, in his work on Maryland Practice, page 400, that when the jury withdraw from the bar, "they have the right to take with them the pleadings in the cause and the written directions of the court"; and this passage of the work was referred to in the opinion of this court with apparent approval, though not at all necessary to the decision, in the case of *Ingalls v. Crouch*, 35 Md. 296. In the case just mentioned, it was not said or intimated that the practice was so established as to forbid the exercise of the discretion of the court below over the subject, and that the refusal to allow the pleadings to be taken by the jury was a subject of exception and review. On the contrary, there are many reasons for holding that the matter rests exclusively in the discretion of the court below. In any case where the court may suppose that the jury might be misled by the statements and allegations of the pleadings, it would certainly be proper that the pleadings be withheld from them. They are not supposed to be the best judges of the technical language of pleading, and able to determine when the allegations are or are not supported, in the contemplation of law. It is in this that the aid of the court is required, and the instructions of the court form the exclusive guide to the jury.

If the instructions given, as in this case, make no reference to the pleadings, even this court, on review, will not assume

that the court below inspected the pleadings, and adjudged them sufficient to sustain the instructions: *Stockton v. Frey*, 4 Gill, 406; 45 Am. Dec. 138; *Owings v. Jones*, 9 Md. 116. The issues to be tried are supposed to be fully explained to the jury at the bar, in the course of the trial, and therefore the jury are not left to grope through the technical verbiage of pleading to ascertain for themselves what issues they are required to determine. Whether they should take with them to their room the pleadings in any case is matter of discretion of the court below, and not the subject of review on appeal.

It follows from what we have said in regard to the two prayers granted on the part of the defendant that the judgment must be reversed, and a new trial awarded.

MUNICIPAL CORPORATION IS NOT LIABLE FOR LEGISLATIVE OR JUDICIAL ACTS, and can only be held liable for negligence in the performance of ministerial acts: *Dooley v. Sullivan*, 112 Ind. 451; 2 Am. St. Rep. 209; *McDade v. Chester*, 117 Pa. St. 414; 2 Am. St. Rep. 681.

WHERE POWER OF MUNICIPAL CORPORATION DEPENDS UPON GRANT OF AUTHORITY, and that authority is essentially discretionary, no legal duty is imposed, and no citizen has a right to demand its performance: *Lehigh Co. v. Hafford*, 116 Pa. St. 119; 2 Am. St. Rep. 587; *McDade v. Chester*, 117 Pa. St. 414; 2 Am. St. Rep. 681.

CITY IS LIABLE FOR COLLECTING AND GATHERING UP SURFACE WATER by artificial means, such as sewers and drains, and casting it upon the premises of another in increased and injurious quantities: *Pye v. Manbato*, 36 Minn. 373; 1 Am. St. Rep. 671, and note collecting other cases on the liability of municipal corporations for injuries by defective sewers.

IN ORDER TO CHARGE MUNICIPAL CORPORATION WITH LIABILITY FOR DEFECTS IN STREETS, it must be shown that the corporation had notice, actual or constructive, of the defect. As to what is such notice, see *Dawson v. Dean*, 10 Col. 375; 3 Am. St. Rep. 594, and cases in note.

PERMITTING JURY TO TAKE PLEADINGS TO JURY-ROOM IS NOT ERROR: *Brant v. Moran*, 8 Minn. 236; 83 Am. Dec. 773; though it is said not to be good practice: *Good v. Martin*, 1 Col. 165; 91 Am. Dec. 706. The matter of sending out papers with the jury is, however, a matter in the discretion of the court, as a general rule: *Little Schuylkill etc. Co. v. Richards*, 57 Pa. St. 142; 98 Am. Dec. 209.

RUTTER v. SMALL.

[68 MARYLAND, 122.]

CO-TENANCY—ADVERSE POSSESSION.—IF ONE TENANT IN COMMON CONVEYS WHOLE ESTATE IN FEE, and his grantee enters and claims and holds the exclusive possession, the conveyance and entry and possession must be deemed adverse to the title and possession of the co-tenant, and amount to a disseisin; and such possession, if continued for twenty years, will bar the title of such co-tenant. The conveyance in fee, and entry under it, and possession, are notorious and unequivocal acts of ownership, of such a nature as to give notice to the co-tenant that the entry and possession are hostile and adverse to his title.

ACTION of ejectment. The opinion states the case.

James Pollard and Henry W. Latone, for the appellant.

Henry Duffy and Joseph Packard, Jr., for the appellees.

ROBINSON, J. The plaintiff is the only surviving child and heir at law of Philip Rutter, and as such is entitled to an undivided one-sixth interest in the lot of ground in controversy, unless his title thereto is barred by the adversary possession of the defendants. The lot originally belonged to his grandfather, Thomas Rutter, who, in 1815, conveyed it to Mary C. Clark for life, and after her death to James Flemming and Jude Clark during their lives, and to the survivor of them. Thomas Rutter died in 1817, leaving six children, one of whom was Philip, the father of the plaintiff. In 1829, all the children of Thomas, with the exception of Philip, conveyed their reversionary interest in the lot to Peter Stein, the deed upon its face reciting an outstanding title in Philip, and in the same year Stein purchased the life estate of James Flemming and Jude Clark, the surviving life tenants. Being thus entitled to the life estate, and to an undivided five sixths in the reversion, Stein entered into possession of the lot and built thereon a brick dwelling-house and stable, and continued in the exclusive possession and enjoyment of the property until his death, in 1859; and after his death, his heirs and devisees continued in the exclusive possession of the property until 1865, when they conveyed it in fee to John Small, Jr., under whom the defendants claim.

Now, whether Stein and the devisees under his will were, upon the determination of the life estate, in possession merely as tenants in common, and their possession, therefore, in legal contemplation, the possession of the co-tenant, the plaintiff, or whether their possession and acts of ownership amounted

to an ouster or disseisin of the plaintiff, are questions which we shall not now stop to consider, for the reason that the possession of Small, and that of the defendants claiming under him, is, in our opinion, a bar to the plaintiff's title. Stein, as we have said, died in 1859, and in 1865 his heirs and devisees conveyed the lot in question by metes and bounds to Small, in fee, with a covenant of general warranty. Under this deed, Small entered into possession, and continued in the exclusive possession and enjoyment of the property until his death, in 1878, since which time it has been in the exclusive possession and enjoyment of the defendants claiming under him,—a period of more than twenty years. Now, we take the law to be well settled that where one tenant in common conveys the whole estate in fee, and his grantee enters and claims and holds the exclusive possession, the conveyance and entry and possession must be deemed adverse to the title and possession of the co-tenant, and amount to a disseisin; and such possession, if continued for twenty years, will bar the title of such co-tenant.

In *Townsend and Pastor's Case*, 4 Leon. 52, where two coparceners were in the use of a manor under the statute of 1 Richard III., and one of them entered and made a feoffment in fee of the whole manor, all the justices held that this feoffment not only passed the moiety of such coparcener which she might lawfully part with, but also the other moiety of the other coparcener by disseisin. And in the later case of *Reed v. Taylor*, 5 Barn. & Adol. 575, it was held that although the general rule is, that where several persons have a right, and one of them enters generally, it shall be an entry for all, for the reason that the entry shall always be taken according to right; yet that any overt act or conveyance by which the party entering or conveying asserted a title to the entirety would amount to a disseisin of the other parties, whether joint tenants, or tenants in common, or parceners. We may also refer to *Clymer's Lessee v. Dawkins*, 3 How. 674; *Kittridge v. Proprietors of Locks*, 17 Pick. 247; 28 Am. Dec. 298; *Clark v. Vaughan*, 3 Conn. 19; *Clapp v. Bromagham*, 9 Cow. 530; and *Thomas v. Pickering*, 13 Me. 337. These cases rest on the ground that the conveyance in fee, and entry under it and possession, are notorious and unequivocal acts of ownership of such a nature as to give notice to the co-tenant that the entry and possession are hostile and adverse to his title.

In this case, the undisputed facts show that Small entered into possession under a deed from the devisees of Stein con-

veying to him the entire lot in fee; and that he, and the defendants claiming under him, have been in the exclusive possession and ownership of the lot from that time to the present, a period of more than twenty years. It can hardly be necessary to say that where one thus enters under a deed conveying the entire property by metes and bounds, his entry and claim of title and possession are to be construed as co-extensive with the terms of his deed: *Prescott v. Nevers*, 4 Mason, 330. Such, then, being the case, we are of opinion that the entry by Small, and the possession by himself, and by the defendants claiming under him, constitute a bar to the plaintiff's right to recover. And if so, there was no error in granting the defendant's second prayer, nor in the verbal instruction by the court that there was no evidence upon which the plaintiff could go before the jury.

It follows also from what we have said that there was no error in refusing the two prayers offered by the plaintiff. And besides, they were objectionable, because there was no evidence upon which the jury could find that the life estates had determined within twenty years before the institution of the suit.

We come then to the exceptions to the evidence, the first and second of which it is unnecessary to consider, because the death of the life tenants was proved in the subsequent progress of the case.

In the third and fourth, the witness testified she was a daughter of Peter Stein, and a devisee under his will, and one of the grantors in the deed to Small, and that she never had heard of an outstanding title to the lot in Philip Rutter or his heirs at law. Now, for the purpose of contradicting the witness, it was clearly competent for the plaintiff's counsel on cross-examination to ask her whether she had any conversation with Small at the time of the execution of the deed in regard to Philip Rutter. And for the same reason he had the right to ask her why the covenant of general warranty was inserted in the deed. But the error of the court in this respect does not furnish sufficient ground to justify us in sending back this case for a new trial. For if it be conceded that the witness had, in fact, heard of an outstanding title in Philip Rutter, and that she had a conversation with Small in regard to it, and further, that Small himself had knowledge of such title, this evidence could not in any manner affect the question of disseisin or ouster by Small, if he entered under his deed,

claiming title to the entire lot, and remained in the exclusive possession thereof for twenty years, the period prescribed by the statute of limitations.

For these reasons the judgment must be affirmed.

DEED BY CO-TENANT TO STRANGER OF ENTIRE ESTATE does not constitute an actual ouster of his co-tenant: *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 281, and note. The authorities upon this subject are not harmonious. The majority, however, hold, and we think with the better reason, that a party is presumed to take and hold possession according to the terms of his deed; and if that deed purports to convey the fee in severalty, he will be presumed, in taking and holding possession under it, to take and hold as a claimant in severalty, and therefore adversely to persons who may have been co-tenants of his grantor: *Freeman on Cotenancy and Partition*, sec. 224; *Parker v. Proprietors*, 3 Met. 101; 37 Am. Dec. 121; *Alexander v. Kennedy*, 19 Tex. 496; 70 Am. Dec. 358; *Dikeman v. Parrieh*, 6 Pa. St. 225; 47 Am. Dec. 455.

HIGGINS v. LODGE.

[68 MARYLAND, 229.]

SALES—FRAUDULENT PURCHASE OF GOODS.—WHERE ONE, THROUGH FRAUD, EFFRONTS the purchase of goods, and places them in the hands of an auctioneer for sale, and the latter, in good faith, advances money upon them, or incurs expenses in relation to them, he acquires title to the goods, and is entitled to the protection of a *bona fide* purchaser against the claim of the original defrauded vendor. But he is not entitled to such protection if, at the time the goods were delivered to him, he had knowledge of circumstances calculated to put a man of ordinary prudence on inquiry as to whether the party who intrusted the goods to him was perpetrating a fraud in selling them by auction, and he failed to make the inquiry into the character of the transaction.

IF, IN ANY PURCHASE, THERE BE CIRCUMSTANCES WHICH, IN EXERCISE OF COMMON REASON AND PRUDENCE, ought to put one upon particular inquiry, he will be presumed to have made that inquiry, and will be charged with notice of every fact which that inquiry would give him.

EVIDENCE OF CIRCUMSTANCES WARRANTING JURY in the particular case in finding a fraudulent purchase of goods.

REPLEVIN. The opinion states the case.

Charles W. Field, Jr., for the appellant.

William Reynolds, for the appellees.

BRYAN, J. Lodge and others replevied certain goods from Higgins. The evidence tended to show that one Hirsch Levy had made a fraudulent purchase of these goods from the

plaintiffs, and that he had sent them for public sale to the defendant, who was an auctioneer. The defendant had made advances of money on them.

On the supposition that the purchase of the goods from the plaintiffs had been accomplished by the fraud of Levy, it is not questioned that it was void at the election of the sellers, and that they could have reclaimed their property from him. But if he sold them to a *bona fide* purchaser without notice of the fraud, a good title would be passed which could not be impeached by the original vendor. Ordinarily a purchaser cannot acquire a title from a vendor who has none. But the authorities show, without dissent, that there is no exception under the circumstances which we have just supposed. In *Powel v. Bradlee*, 9 Gill & J. 278, it is said: "In such a case, good faith and a valuable consideration would be essential constituents of a good title." If these features do not appear in the transaction, we take it that the title fails. An interest in the goods, acquired by making advances on them when placed in the hands of an auctioneer for sale, would be protected under the same circumstances which would make a purchase valid.

The court instructed the jury that if Levy's purchase was fraudulent, the defendant's title would be defeated, unless they found he had, in good faith, advanced money to Levy upon the security of the goods, or incurred expenses in relation to them. On the prayer of the defendant, the court ruled that the plaintiff could not recover, if the jury found that the advances were made by the defendant without notice or knowledge of the circumstances under which Levy purchased the goods. On the prayer of the plaintiffs, it was ruled that they were not precluded from recovering by these advances, if the jury found that, at the time the goods were delivered to the defendant, he had knowledge of circumstances calculated to put a man of ordinary prudence on inquiry as to whether Levy was perpetrating a fraud in selling the goods by auction, and that he failed to make inquiry into the character of the transaction. Taking these instructions together, it seems to us that they laid the case properly before the jury. Higgins could not deduce title to the goods through a fraudulent vendee unless he showed that his advances were made in good faith. If he knew that Levy was selling these goods for the purpose of carrying into effect a fraud, his advances could not be considered as made in good faith; and if the circum-

stances were such as reasonably to call for inquiry, and if inquiry would have given him this knowledge, he is responsible in the same way as if he had obtained it. It has been held that if in any purchase "there be circumstances which, in the exercise of common reason and prudence, ought to put a man upon particular inquiry, he will be presumed to have made that inquiry, and will be charged with notice of every fact which that inquiry would give him": *Baynard v. Norris*, 5 Gill, 483; 46 Am. Dec. 647. To the same effect are *Green v. Early*, 39 Md. 229; *Abrams v. Sheehan*, 40 Id. 446.

The evidence showed that Levy rented a basement room about the 15th of June, 1885, and commenced business as a jobber; that between that time and September 7th, he purchased a large quantity of goods,—six thousand dollars' worth being purchased from these plaintiffs; that in the latter part of June, 1885, he commenced sending goods to the defendant to be sold by auction, the defendant making advances on them; that he continued to send goods for this purpose, and to receive advances from the defendant until September 5th; that the amount of these auction sales was more than six thousand four hundred dollars; that on September 5th, Levy had in his store only four or five hundred dollars' worth of goods; that the week before he had fifteen thousand dollars' worth; that he had opened a bank account on the 11th of July, and on the 7th of September he drew out the balance to his credit, with the exception of a small sum; that after that day he was regarded as utterly insolvent; that he purchased the goods in question from the plaintiffs on the 21st of August on credit, the time fixed for payment being October 10th; that the small balance to his credit in the bank was attached by creditors, and that after September his business was conducted in his wife's name. The evidence certainly warranted the jury in finding that when Levy purchased these goods he did not intend to pay for them, and that he was engaged in a deliberate scheme of fraud, which he was effecting by purchasing large quantities of goods on credit, selling them by auction, and putting the proceeds beyond the reach of his creditors. Notwithstanding fraud on the part of Levy in making the purchase in question in this case, the title of Higgins would be good if the matters within his knowledge did not reasonably suggest to him the propriety of inquiring into the transactions in which Levy was engaged, and if this inquiry would not have discovered his fraudulent courses. It

was the province of the jury to determine this question on the evidence in the cause.

Judgment affirmed.

WHERE PARTY CLOTHES ANOTHER WITH APPARENT TITLE TO OR POWER OF DISPOSITION over his property, he will not be permitted to deny the title of innocent purchasers: *Velsion v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184, and note discussing the points ruled on in the principal case; and see *Lincoln v. Guyan*, *post*, p. 446.

PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD COMPANY v. DAVIS.

[68 MARYLAND, 281.]

SURFACE WATER—OBSTRUCTING FLOW OF.—If, FOR PURPOSE OF CONSTRUCTING RAILROAD, or for any other purpose, it becomes necessary to erect an embankment, a proper outlet or culvert must be provided of ample capacity to carry off the flow of surface water, so that it may not be obstructed, and thus accumulated on the upper and adjacent lands of other persons. But while such outlet must be of ample capacity to carry off all the water likely to be in it, the rule is not applicable to an extraordinary and excessive rainfall, which is held to be *vis major*. Such infrequent and extraordinary occurrences cannot be foreseen and provided against, and for damages caused by them no one is responsible.

RAILROAD COMPANY UNDERTAKING TO ALTER ESTABLISHED OUTLET through which surface water was carried away is bound to have the work done in a careful and skillful manner; and if it be done carelessly and negligently, so that, as a consequence, injury to neighboring property ensues, an action for damages is maintainable.

John J. Donaldson and Bernard Carter, for the appellant.

S. A. Williams and John T. Ensor, for the appellee.

YELLOTT, J. An action on the case was instituted by the appellee against the appellant to obtain compensation, by the recovery of damages, for alleged injuries to the plaintiff's property, caused by an overflow of surface water resulting from an alteration by the defendant of an existing drainage. The appellee is the owner of a house and lot in Canton at the northeast corner of Clinton and Boston streets. The appellant has a line of railroad laid on the bed of Boston Street, which street terminates at its junction with Clinton Street; but the track of the road crosses Clinton Street, and extending eastwardly, passes the south side of appellee's lot in such close proximity that only a space of a few feet intervenes between the curb of the sidewalk on the south of said lot and a

lateral track leading from the main track of the road into a large open lot north of Boston Street. In 1880, and for more than twenty years anterior to that period, there was a large open gutter, or water-channel, in which the surface water flowed from the higher ground north and east of the railroad. This gutter extended along the track, passing the south side of appellee's house and across Clinton Street, and then down Boston Street westwardly, until it discharged the current of water into an open ditch, through which it was carried into the Patapsco River. There is evidence tending to show that this open gutter was of ample capacity to carry off the surface water, and that the appellee sustained no injury from an overflow prior to 1880, when the appellant closed this open gutter along Boston Street, across Clinton Street, and eastwardly to a paved alley in the rear of appellee's house; substituting for said open gutter an iron pipe, with an interior diameter of about eighteen or twenty inches. It is also shown by the evidence that the bed of Clinton Street, at the crossing, was raised; that a box drain was put across the tracks on the east side of and parallel with Clinton Street; and that across Clinton Street was put a smaller drain, covered with iron plates. Into the box drain, and at right angles thereto, was introduced another box drain, immediately south of appellee's pavement. It is alleged, and evidence has been adduced tending to show, that these alterations in the drainage lessened the capacity of the outlet for the surface water, so that whenever there was a copious rainfall, the water accumulated and flowed into the appellee's cellar. The result of this flooding has been a serious injury to the walls of the building, which have been so badly cracked and weakened that desirable tenants have abandoned the property. To recover damages for the injury thus sustained, this action was instituted.

It is observable that this record does not disclose a case where there has been an artificial obstruction interposed so as to produce an interruption or diversion of the current of a permanent stream of water flowing in its ordinary channel. The injury complained of proceeds from an obstruction to the flowage of surface water, which, prior to the alleged wrongful act of the defendant, had found an ample outlet, through which it was carried off without any damaging consequences to the property of coterminous proprietors. In considering questions thus arising, we encounter some diversity and conflict in the reported decisions. In Massachusetts and some

other states it has been held that the owner of land may lawfully prevent surface water from coming upon it, although in so doing the water may be made to flow upon adjoining land, and cause loss and injury to coterminous proprietors: *Gannon v. Hargaden*, 92 Mass. 106; 87 Am. Dec. 625; *Dickinson v. City of Worcester*, 89 Mass. 19; *Buffum v. Harris*, 5 R. I. 243.

But in most of the states this doctrine does not seem to have been sanctioned by adjudication. In a case very recently decided by the vice-chancellor of New Jersey, it was emphatically said that "the broad doctrine declared by some courts, that no right of any kind can be claimed in the flow of surface water, and that neither its retention, diversion, repulsion, or altered transmission will constitute an actionable injury, has never been adopted, in all its length and breadth, in this state": *Field v. West Orange*, 86 N. J. Eq. 118; 37 Id. 600.

The prevailing doctrine in this country seems to be that the owner of the upper land has a right to the uninterrupted flowage of the water caused by falling rain and melting snow, and that the proprietor of the lower land, to which the water naturally descends, has no right to make embankments whereby the current may be arrested and accumulated on the property of his neighbor. This is the rule of the civil law, apparently founded on the principles of justice, and said to be "received with constantly increasing favor in the United States": *Crawford v. Rambo*, 44 Ohio St. 279; *Martin v. Riddle*, 26 Pa. St. 415; *Porter v. Durham*, 74 N. C. 767; *Buller v. Peck*, 16 Ohio St. 336; 88 Am. Dec. 452; *Ogburn v. Connor*, 46 Cal. 346; 13 Am. Rep. 213.

The principle established by these authorities seems to sanction the doctrine that if the water is allowed to flow without artificial obstruction, and the current encounters a natural obstruction, caused by the elevation of the earth's surface at the boundary line, the proprietor of the upper land has no right to demand an outlet of his neighbor, nor is the latter liable for any injury caused by the accumulation of the water; for it would be absurd to say that a man can be sued for damage caused by the operation of natural laws not put in motion by his own instrumentality. But every man is responsible for injuries resulting to others from his own acts not sanctioned by legal principles. So if, for the purpose of constructing a railroad, or for any other purpose, it becomes necessary to

erect an embankment, a proper outlet or culvert must be provided, of ample capacity to carry off the flow of water, so that it may not be obstructed and thus accumulated on the upper and adjacent lands of other persons; for, as regards coterminous estates, no one can legally assume the right to alter the condition of things so as injuriously to affect the pre-existing rights of his neighbor. The outlet must therefore be carefully and skillfully constructed, so that no damage may result to contiguous property. In *Harrison v. Great Northern R'y Co.*, 3 Hurl. & C. 236, Pollock, C. B., said: "They are bound to maintain a sufficient cut or delf. The sufficiency of a cut depends on its depth, width, fall, and outlet, as compared with the water likely to be in it. Now, in this case, the cut was not sufficient to hold the water likely to be in it, owing to the condition of the outlet."

The rule is, that the outlet must be of ample capacity to carry off all the water likely to be in it. But the rule is not applicable to an extraordinary and excessive rainfall, which is held to be *vis major*. Such infrequent and extraordinary occurrences cannot be foreseen and provided against, and for damages caused by them no one is responsible. Recognizing and adopting this principle, the supreme court of Texas, in an action to recover for injuries caused by the construction of insufficient culverts in the defendant's railroad embankment, held that "if the overflow was of such an extraordinary character that railroad engineers of ordinary care and prudence in the construction of the embankment and culverts could not reasonably be expected to have anticipated and provided against, the railroad was not liable": *Gulf, Colorado etc. R'y Co. v. Pomeroy*, 67 Tex. 498.

With this exception in relation to extraordinary floods, the rule is as already stated. And it is held that where, in some particular locality, a municipal corporation is under no obligation to construct drains or culverts so as to protect the property of individuals, or to provide means for carrying off surface water, yet if it does construct them, and the work is performed in a negligent or unskillful manner, or if it is negligent in the management of them, it is liable in damages: *Seifert v. City of Brooklyn*, 101 N. Y. 136; 54 Am. Rep. 664; *Gilluly v. City of Madison*, 63 Wis. 518; 52 Am. Rep. 299; *Henderson v. City of Minneapolis*, 32 Minn. 319; *Allen v. City of Chippewa Falls*, 52 Wis. 430; 28 Am. Rep. 748.

In *Johnston v. District of Columbia*, 118 U. S. 19, Gray, J.,

said that "the construction and repair of sewers, according to the plan adopted, are simply ministerial duties, and for any negligence in so constructing a sewer or keeping it in repair, the municipality who has constructed and owns the sewer may be sued by a person whose property is thereby injured."

In the case now under consideration, the appellant undertook to alter the established outlet through which the surface water was carried away. It was incumbent on the corporation to have this work done in a careful and skillful manner. If done carelessly and negligently, so that, as a consequence, injury to the plaintiff ensued, an action for damages is maintainable. The facts in evidence relating to the manner in which the work was done were considered and passed upon by the jury, guided and enlightened, in relation to the legal principles applicable to the evidence believed by them to be true, by the instructions emanating from the court. The rulings of the court on the instructions asked for present the questions now to be determined.

The plaintiff offered but one prayer, which was granted, and to this ruling the defendant excepted. In this instruction, the jury are told that if they believe from the evidence that the defendant closed the open trench or gutter, and raised the bed of Clinton Street, and that the closing of the gutter and raising the bed of the street caused such water as usually flowed through said gutter to dam and overflow the plaintiff's premises, and that such damage and overflow would not have occurred but for the closing of said gutter and raising the bed of said street, and that the plaintiff's house was injured by such overflow, then they must find their verdict in favor of the plaintiff. In other words, the jury were told that if they believed from the facts offered in evidence that the property of the plaintiff was injured, and that the injury was caused by the act of the defendant in closing the usual outlet for the surface water, raising the bed of the street, and constructing another outlet of insufficient capacity to carry the water likely to be in it, the defendant was liable. This instruction was tantamount to saying that the defendant was liable for injuries resulting from its own unskillfulness or negligence, and there was no error in granting it.

The defendant offered ten prayers, two of which were rejected, and another granted with modifications made by the court. To the rejection of these two prayers, and to the granting of the other as modified, exceptions have been taken.

The fourth and fifth prayers of the defendant were properly rejected. . The fourth prayer presents the proposition "that there is no legally sufficient evidence in this case that the defendant changed the natural direction of the drainage at or near the plaintiff's premises." This is repeated in the fifth prayer, with the addition that there is no legally sufficient evidence that the defendant ever diminished or decreased the carrying capacity of any of the drains except the drain across Clinton Street. An analysis of the evidence in relation to alterations in the drainage would lead to useless prolixity, and it is sufficient to say that there is proof in abundance, offered on the part of the plaintiff, tending to show that there have been changes in the mode and direction of the drainage, and that the present plan of drainage adopted by the defendant is insufficient to carry off the currents of water. The court could not have granted these two prayers relating to the legal insufficiency of the evidence, because, each being in the nature of a demurrer to evidence, the truth of the evidence must have been assumed. The ninth prayer of the defendant reads thus:—

"That if the jury shall believe from the evidence that the original construction of plaintiff's house, or alterations made in it by plaintiff, or the changes naturally incident to a house such as that of the plaintiff, or any of them, was sufficient to cause the injuries to the house, such as have been testified to, then, under the pleadings in this case, the plaintiff is not entitled to recover."

This prayer was modified by the addition of the following words: "Unless the jury, after taking into consideration all the facts and circumstances of the case as testified to by the witnesses (including such defective construction and changes, if the jury shall so find), shall determine from a preponderance of testimony that the injuries complained of were occasioned by the acts of the defendant, as set forth in the plaintiff's first prayer."

It will be observed that the prayer as offered did not put it to the jury to find that the original construction or the alterations in the house did actually cause the injury which forms the foundation for this action. The prayer as presented tended to mislead the jury. Moreover, in this case there was another independent and efficient cause which might have been productive of the injury, and the court very properly modified the instruction so as to bring that cause under con-

sideration by the jury: *Baltimore etc. R. R. Co. v. Reaney*, 42 Md. 186.

Finding no error in any of the rulings of the learned judge in the court below, the judgment should be affirmed.

RAILROAD COMPANY IS BOUND TO MAINTAIN SUFFICIENT CULVERTS in embankments to prevent the flooding of lands of others, and is liable for damages for neglecting so to do: *Ohio etc. Ry Co. v. Wachter*, 123 Ill. 440; 5 Am. St. Rep. 532.

LINCOLN v. QUINN.

[66 MARYLAND, 293.]

BONA FIDE PURCHASER OF GOODS, WITHOUT NOTICE OF CONDITION upon which his vendor has acquired the possession, will be protected against the claim of the original vendor, in the same manner where the sale and delivery are conditional as where the possession has been obtained by fraud.

SALES — TITLE OF MORTGAGEE WITHOUT NOTICE OF CONDITIONS. — WHERE GOODS ARE SOLD ON CONDITION THAT TITLE SHOULD NOT VEST in the vendee until the price should be paid in full, by monthly installments, and before payment of the purchase-money in full the vendee mortgages the goods to one having no notice of the terms of the conditional sale, the title of such mortgagee must be sustained against the claim of the original vendor. But the rule is otherwise if the mortgagee had information which fairly put him upon inquiry, in which case he is chargeable with notice of every fact which that inquiry would have ascertained.

IN. — COURT OF EQUITY WILL NOT ENFORCE STIPULATION in a contract of sale that on default by the vendee in any of the credit payments, the vendor might reclaim and take possession of the goods, and that all previous payments should be forfeited.

David S. Briscoe, for the appellant.

Clayton O. Keedy, John C. Motter, and William P. Maulsby, Jr., for the appellees.

BRYAN, J. The question in this case involves the validity of a title to goods and chattels derived from the vendee in a conditional sale. In *Hall v. Hinks*, 21 Md. 406, it was decided that "a *bona fide* purchaser, without notice of the condition upon which his vendor has acquired the possession, will be protected against the claim of the original vendor, in the same manner where the sale and delivery are conditional as where the possession has been obtained by fraud." Twenty-three years have passed since this decision was made, and in the course of that time it has been repeatedly approved by this court. It is of great importance that the administration

of justice should be conducted according to fixed and certain rules. Vacillation and uncertainty in the judgments of the courts produce a feeling of insecurity as to rights and property, and surely tend to encourage disorder, discord, and confusion in social and domestic life. The law on this subject has been otherwise settled in many of the states of the Union. In *Harkness v. Russell*, 118 U. S. 663, a very learned and elaborate examination of the question was made by the supreme court of the United States, and the positions taken in the opinion were maintained with great force and clearness. The laws of the several states have probably had their origin in the necessities and interests of the people concerned, and doubtless have been adapted to their condition and circumstances under the guidance of a wise public policy. We read with pleasure and profit the able disquisitions delivered by other courts, but we are not unmindful that it is our duty to declare our own law as it belongs to our own people. Having found this question settled by all the authority which can be bestowed by repeated decision and long acquiescence, we are unwilling to disturb it.

The contract of sale in this case contained an express stipulation that the title to the goods should not vest in the vendee until the price should be paid in full; and installments were to be paid monthly. They were sold in the city of Baltimore by Lincoln, the appellant, to Hoover, and were carried by him to Frederick, and used in a hotel which he was keeping in that place. More than a year afterwards, the purchaser mortgaged these goods to Quinn, Addison, and Winebrenner to secure the payment of two notes of even date with the mortgage, payable by the purchaser to a bank. On one of these notes all of these mortgagees were securities, and on the other, Winebrenner alone was security. A few days after this mortgage, a second one was made by the purchaser to Ritter and other persons to secure a promissory note of same date, payable by him to them. All the above mortgagees are appellees in this case. A short time after the date of these mortgages, all of the property of Hoover was placed in the hands of receivers by an order of the circuit court for Frederick County sitting in equity. A large portion of the purchase-money remaining unpaid, Lincoln filed a petition in which he asserted title to these goods, and prayed that they should be delivered to him by the receivers; or if the court should think that he was entitled only to the bal-

ance of the purchase-money which was unpaid, then that the receivers should be directed to pay him said balance, or if they had no funds applicable to that payment, that the goods should be sold and the balance paid out of the proceeds of sale. It is shown by the evidence that none of the mortgagees, except Winebrenner, had any notice of the terms of the conditional sale, or of any claim on the part of Lincoln to the goods. With respect to Winebrenner, he had information of matters which fairly put him on inquiry, and, according to the established rule, he must be charged with notice of every fact which that inquiry would have ascertained: *Higgins v. Lodge*, *ante*, p. 437. The result is, that Winebrenner's title is not good, but that of the other mortgagees must be sustained. The prayer of the petition was for certain specific relief, which was properly refused. It asserted a claim to the whole property, or alternatively to the amount of the purchase-money remaining unpaid, and it was directed against all of the mortgagees. It could not be granted in that form, and there was no prayer for general relief. The petitioner, however, is not without remedy against Winebrenner. He may still file a petition against him, and he will be entitled to receive such portion of the proceeds of the sale of the goods as may be applicable to the debt on which he is the only surety, subject to an abatement which will be presently mentioned. It would not be just to deprive these persons who are co-sureties with him of their rights under the mortgage. They are in no sense partners with him, and ought not to be affected by notice which is entirely personal to him. It is true that the payment of the debt will inure to Winebrenner's benefit. But it is their right to have the proceeds of the goods applied to its payment, whatever may be the incidental advantage to others.

It was stipulated in the contract of sale that if Hoover made default in any of the credit payments, Lincoln might reclaim and take possession of the goods, and that all payments which had been made up to that time should be forfeited. A court of equity will not lend its aid to enforce a forfeiture of this kind. Against persons liable to his claim on the property he could in equity recover an interest in the goods equal to the amount of the unpaid purchase-money. That portion of this interest which would be applicable to the payment of the note secured by Winebrenner alone is still the property of Lincoln, and he must be paid out of the proceeds of sale of the goods a sum duly representing this portion.

The order of the circuit court will be affirmed, but leave will be given to the appellant to file a new petition stating his claim according to his rights as above declared.

Order affirmed, and cause remanded.

RIGHTS OF BONA FIDE PURCHASERS OF GOODS WITHOUT NOTICE OF CONDITION on which his vendor has received them: See *Velsion v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 314, and extended note thereto; and see *Higgins v. Lodge*, ante, p. 437.

BALTIMORE ETC. TURNPIKE CO. v. BATEMAN.

[68 MARYLAND, 389.]

HIGHWAYS. — TO MAKE ROAD SAFE, TRACK MUST BE WIDE ENOUGH to allow for the possible shying and starting of teams, without danger to those traveling with them of being thrown over embankments or against obstacles in and along the road; and if the track is not wide enough for this purpose, and a horse, in starting or running away, without fault of the driver, is brought in contact with a defect within what should be the reasonable limits of the road, and damage ensues, the managers of the road will be liable.

ERRONEOUS INSTRUCTION TO JURY. — IN ACTION TO RECOVER FOR INJURY CLAIMED to have been caused by the defective and insecure condition of the defendant's turnpike road, an instruction to the jury that if they should find "that the defendant negligently permitted a part of its road, one of its bridges, and the approach thereto, to be in an unsafe condition for persons using the same with ordinary care and caution, and that in consequence of such unsafe condition, the plaintiff, while traveling over said road and approaching said bridge with ordinary care and caution, was injured as complained of, then the plaintiff is entitled to recover," etc., is erroneous, since the defective condition and want of repair of the bridge had no casual connection with the injury sustained by the plaintiff before reaching the bridge.

IN SUCH ACTION, INSTRUCTION TO JURY THAT PLAINTIFF COULD NOT RECOVER unless they should find that the defect in the road was of such a nature that a criminal indictment would lie against the defendant for such defect, is properly rejected, if for no other reason that it required the jury to determine, as matter of law, when and for what defect an indictment would lie.

Robert R. Boorman and George Hawkins Williams, for the appellant.

George Y. Maynadier, for the appellee.

ALVEY, C. J. This action was instituted to recover of the defendant for an injury sustained by the plaintiff while traveling on the turnpike road of the defendant, from his home in Harford County to the city of Baltimore; the injury being caused, as it

is alleged, in consequence of the defective and insecure condition of the road.

The accident occurred in the forenoon of the 19th of April, 1885. The plaintiff was traveling in a one-horse wagon; the horse was owned by the plaintiff, but he had borrowed the wagon of a neighbor. While proceeding on his way he came to the top of a hill, and in descending the grade of which, to a bridge or culvert across the road, the horse ran away and became quite unmanageable by the plaintiff; and as he approached the bridge the horse left the road and turned the vehicle over into the side-ditch, and the plaintiff was thrown out and quite seriously injured.

At the trial below, among other prayers offered by the defendant for instruction to the jury, was one to the effect that there was no evidence legally sufficient upon which the plaintiff could recover. That prayer was rejected; and, upon careful examination of all the evidence contained in the record, this court is of opinion that there was no error committed in the refusal to grant that prayer.

The defendant was incorporated by the act of the general assembly passed on the 3d of January, 1816; and its turnpike road was constructed under the provisions of that act, and the supplemental act passed on the 19th of January, 1819. By its charter the defendant was authorized to open and make a turnpike road between the points designated, "not exceeding sixty feet in width, of which twenty feet at least shall be an artificial road, composed of stone, gravel, etc., and erect and keep up bridges over the streams crossing the same." The road was made and has been in use for more than half a century. It appears by the proof, offered both by the plaintiff and defendant, that the road has several curves from the top of the hill to the bridge, at which the accident occurred; and, in the language of the witnesses, it has "some steep grades and sharp descents"; but that the descending grade terminates from fifty to one hundred yards before the bridge is reached. It is also shown that the macadamized part of the road varies in width from twenty-five feet at the top of the hill to about sixteen or seventeen feet at the bridge; and that the bridge, as it existed at the time of the accident, was about eighteen feet wide in the clear. The road-bed, at its immediate approach to the bridge, was four or five feet above the side-ditch into which the plaintiff was thrown, and there was no guard-rail along the side of the road as it approached the bridge. The

horse and wagon did not get upon the bridge, but got over the side of the road into the ditch just at the end of the bridge. And the whole question is, whether the narrowness of the road-bed, and the failure of the defendant to keep and maintain a sufficient guard-rail on the side of the road as it approached the bridge, constituted such defect and want of safety in the road as to render the defendant liable; if but for the want of width of the road and proper guard-rail the accident to the plaintiff would not have occurred.

The accident as proved must be connected with the alleged defect in the road as the cause of the injury. If the road in its approach to the bridge was wide enough for the customary travel with safety, those traveling using ordinary care to avoid accidents, and the injury to the plaintiff was occasioned by the want of care or skill in driving the horse, or by the vicious and uncontrollable disposition of the horse, not excited by any defect in or unlawful object upon the road, then, unquestionably, the plaintiff would not be entitled to recover.

But, on the other hand, if the road was so narrow at the place of the accident as to render it in any degree dangerous or unsafe to persons driving horses of ordinary safe habit, but which might be liable to shy from the road track, or to take fright and to plunge into the side-ditch below, then it was the duty of the defendant to keep up at least a sufficient guard-rail or barrier to prevent such accidents. And if the accident to the plaintiff was caused, not by his own want of ordinary care, but by reason of the existence of such defect in the road, and the want of proper guard to avoid accidents, the defendant, clearly, would be liable for any injury sustained. All horses are prone, more or less, to shy or to take fright. Indeed, it is part of their natural and probable habit; and they are not condemned as being unfit for road service because they are liable to such habit. Roads are constructed with reference to this generally known or probable habit of horses; and hence, to make a road safe, the track must be wide enough to allow for the possible shying and starting of teams, without danger to those traveling with them of being thrown over embankments, or against obstacles in or along the road. And therefore, if the track is not wide enough for this purpose, and a horse, in starting or running away, without fault of the driver, is brought in contact with a defect within what should be the reasonable limits of the road, and damage ensues, the managers of the road will be liable: Wharton on Negligence, *secs.*

104, 105, 985. There has been some diversity in the opinions of judges upon this subject; but the principle maintained by a preponderance of decision would seem clearly to be in accordance with that which we have stated.

The principle embodied in the first prayer offered by the plaintiff, and which was granted by the court below, is correct, according to the view entertained by this court, and that prayer fairly embraces the law of the case; but its terms are not all free from objection, and it was for that reason calculated to mislead the jury. It should therefore have been either modified or rejected. By granting this prayer, the jury were instructed that the defendant was required to make and keep its road, its bridges thereon, and the approaches to such bridges, in such a manner and so guarded as to make them safe for persons traveling over the same with ordinary care and caution; and if they should find "that the defendant negligently permitted a part of its road, one of its bridges, and the approach thereto, to be in an unsafe condition for persons using the same with ordinary care and caution, and that in consequence of such unsafe condition the plaintiff, while traveling over said road and approaching said bridge with ordinary care and caution, was injured as complained of, then the plaintiff is entitled to recover in this action," etc. There was considerable testimony given to show the condition of the bridge; that it was out of repair, and was unsafe. But the defective condition and want of repair of the bridge had no causal connection with the accident; for the plaintiff's horse and wagon, according to all the testimony, his own included, did not get upon the bridge, but they left the track of the road, and got into the side-ditch at the end of the bridge. The bridge, according to the evidence and to actual measurement, was wider than the bed of the road as the latter approached the bridge. According to the terms of the instruction, the jury might have inferred that the defective condition of the bridge formed an element and was ground for holding the defendant liable for the injury to the plaintiff. The instruction should have been more explicit in confining the attention of the jury to the supposed defect in the road that occasioned the accident.

There does not appear to have been error in any of the other rulings of the court. The first, second, and third prayers of the defendant were properly rejected, as being inconsistent with the principle embodied in the first prayer of the plaintiff,

which was adopted by the court. The defendant's fourth, eighth, and ninth prayers, which were granted, would seem to have been as liberal to the defendant as it could in reason ask. The seventh prayer of the defendant asked the court to instruct the jury that the plaintiff could not recover unless they should find that the defect in the road was of such a nature that a criminal indictment would lie against the defendant for such defect. It is enough to say of such prayer, that it was properly rejected, if for no other reason that it required the jury to determine, as matter of law, when and for what defect an indictment would lie. But we know of no such criterion for determining the private civil rights of a party to recover for an injury suffered as that propounded by this prayer. We shall reverse the judgment for the error pointed out in the first prayer of the plaintiff, and award a new trial.

Judgment reversed, and new trial awarded.

LIABILITY FOR INJURIES CAUSED BY OBSTRUCTIONS IN HIGHWAYS: See note to *Nurse v. Richmond*, 98 Am. Dec. 608 et seq., and see particularly p. 610 as to duties and liabilities of turnpike companies.

FIRST NATIONAL BANK OF BALTIMORE v. GERKE.

[68 MARYLAND, 449.]

PRINCIPAL AND SURETY.—OBLIGATION OF SURETY IS NOT TO BE EXTENDED beyond what the terms of the contract fully import.

IN CASE OF SURETY STANDING BOUND FOR FIDELITY OR CAPACITY of a principal appointed to a particular office or employment, if the nature of the employment is so changed by the act of the employer that the risk of the surety is materially altered from what was contemplated by the parties at the time of entering into the bond, the surety has a right to say that his obligation does not extend to such altered state of things. Regard must be had to the intention of the parties when the bond was executed, and whatever facts will shed light upon the question of intention may be considered in construing the bond.

CHANGE IN EMPLOYMENT OF BANK CLERK from that of assistant book-keeper to note-teller involves a material increase of risk to the surety on his bond, conditioned for the honest and faithful performance of his duties as a clerk of the bank, and releases such surety from his obligation under the bond.

J. Alexander Preston, for the appellant

Edward N. Rich and Bernard Carter, for the appellee.

ALVEY, C. J. This action was brought upon a bond by the appellant against John D. Lisle and the appellee, the latter being surety; Lisle, the principal in the bond, having absconded, was returned "not summoned."

The bond bears date the 13th of August, 1867, and was given by Lisle upon his appointment by the appellant to the position of assistant book-keeper in its banking-house. The bond recites that "whereas the above-bound John D. Lisle hath been duly appointed a clerk of the said First National Bank of Baltimore," therefore the condition of the obligation is such "that if the said John D. Lisle, for and during the time he shall continue in employment in the said First National Bank of Baltimore, shall faithfully and honestly perform all the duties and services in the said First National Bank of Baltimore which shall, from time to time, be required of him by the board of directors of said bank, or the president or cashier thereof, or by or under their authority, and faithfully and honestly fulfill all the trusts that shall be by them, or by or under their authority, in him reposed in his said appointment of clerk of the said First National Bank of Baltimore, then this obligation to be void; otherwise to be and remain in full force and virtue." The bond was duly accepted and approved by the board of directors as the "bond of John D. Lisle as clerk."

The appellee pleaded general performance of the condition of the bond; and that plea was simply, in an informal way, traversed by the appellant, and thus an issue was formed upon which the case was tried.

The proof in the case shows that Lisle remained in the employ of the bank from a time prior to the date of the bond, in August, 1867, to the 27th of January, 1887; and that during that time his clerical position and the amount of his salary were repeatedly changed. His duties and functions were not only multiplied and enlarged, but his responsibility and his facility for peculation were greatly increased. From being an assistant book-keeper at the time the bond was given and accepted, he was, in June, 1870, appointed to the position of deposit book-keeper, and in November, 1871, he was made discount and foreign collection clerk. This latter position he held until January, 1872, when he was placed in the position of note-teller and discount clerk, which position he held down to the time of his leaving the bank. The duties of his position of note-teller and discount clerk required him to keep

separate and collect as they fell due all the notes discounted by the bank, and to collect all checks and drafts coming to the bank for collection; and the money thus received by him it was his duty to account for and pay over to the receiving-teller at the end of each day, or at the beginning of the next day. These duties and functions pertained to the position assigned to Lisle, and held by him, from January, 1872, to the time of his absconding; and all the large defalcation, amounting in the aggregate to near about ninety thousand dollars, was committed by him during the time that he held the position of note-teller and discount clerk. As assistant book-keeper, the position held by him at the time the bond was given, it was no part of his duty to receive or pay out any of the moneys of the bank; and it was in proof that the appellee was informed by Lisle, at the time the bond was given, that he, Lisle, was appointed to the position of assistant book-keeper in the bank.

Upon all the evidence, the appellant asked the court to instruct the jury that if they should find that Lisle, from the delivery of the bond to the time of his leaving the bank, acted as clerk in the bank, and that while so acting he received sums of money belonging to the bank which he fraudulently retained, the appellant was entitled to recover. This prayer was rejected by the court, and we think rightly so. It proceeds upon the theory that as long as Lisle continued to hold a clerical position in the bank, the terms of the condition of the bond applied to him, and operated as a security for the faithful discharge of his duties, and is therefore liable for his defalcations, notwithstanding any radical change made in his position in the bank, and in the nature and character of the duties required of him in his changed position after the bond was given.

This would certainly be a very severe construction of the bond; and to justify it, the bond should contain very plain and imperative terms, such as we do not find it to contain. The bond should receive a reasonable construction, made in view of the facts under which it was executed; and therefore the construction adopted by the court below would seem to be proper, under all the circumstances of the case. By the instruction given at the instance of the appellee, the jury were directed that if they should find that when the bond was given Lisle was but an assistant book-keeper in the bank; that in 1872 he was taken from the position he then occupied, and

was given the position of note-teller and discount clerk, and never after such appointment occupied the position of assistant book-keeper or individual book-keeper; and that the duties and responsibilities of said position of note-teller and discount clerk were materially different from the duties of the position of assistant book-keeper and from those of individual book-keeper; and that while occupying the position of note-teller and discount clerk, Lisle appropriated to his own use the money of the bank, and was enabled to do so because of the opportunity afforded to him in the handling of the moneys of the bank in the course of the discharge of the duties of his position of note-teller and discount clerk; and that no opportunity would have been afforded him to appropriate such money in his position as assistant or as individual book-keeper,—then the appellant could not recover. In our judgment, this instruction placed the case fairly before the jury; and as they are presumed to have found their verdict in accordance with the instruction, there is nothing in the case of which the appellant can complain.

It is one of the well-established principles of law that the obligation of a surety is not to be extended beyond what the terms of the contract fairly import. A surety has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, such variation operates a release of the surety. In the case of a surety standing bound for the fidelity or capacity of a principal appointed to a particular office or employment, if the nature of the employment is so changed by the act of the employer that the risk of the surety is materially altered from what was contemplated by the parties at the time of entering into the bond, the surety has a right to say that his obligation does not extend to such altered state of things. This is a doctrine in regard to which the authorities all agree: *Miller v. Stewart*, 9 Wheat. 680; *Pybus v. Gibbs*, 6 El. & B. 902; *Manufacturers' Nat. Bank v. Dickerson*, 41 N. J. L. 448; 32 Am. Rep. 237; *Mumford v. Memphis etc. R'y Co.*, 2 Lea, 393; 31 Am. Rep. 616. And it is a principle of universal application, that, in order to arrive at the intention of the parties, the contract itself must be read in the light of the circumstances under which it was entered into. General or indefinite terms employed in the contract may be thus explained or restricted in their meaning and application; and the contract must be so construed as to give it such effect, and none other, as the par-

ties intended at the time it was made. These principles are elementary; and applying them to the terms of the bond, when those terms are considered in reference to the facts of the case, there would seem to be no doubt of the correctness of the ruling of the court below.

As we have said, regard must be had to the intention of the parties when the bond was executed; and whatever facts will shed light upon the question of intention may be considered in construing the bond: *Mumford v. Memphis etc. Ry Co.*, 2 Lea, 393; 31 Am. Rep. 616. Hence we may look to the position held in the bank by Lisle at the time the bond was given. He had been appointed assistant book-keeper, and it was with reference to that appointment that the bond was given to and accepted by the bank. The bond recites the fact that Lisle had been appointed a clerk in the bank, and the extrinsic facts identify the clerkship as that of assistant book-keeper.

That position, however, had not at the time of the bond given, and has never had, any of the duties and functions pertaining to it that pertain to the position of note-teller and discount clerk, to which Lisle was subsequently appointed. This latter position was one entirely different from that of book-keeper, and was of great responsibility, and, from its very nature, was of much greater risk and peril to the surety than the former position held by Lisle. It is true, the terms of the condition of the bond are very large and comprehensive, but they all have reference to the previous appointment as clerk. By the terms of the bond, it was certainly competent to the board of directors, or to the president or cashier, to impose additional consistent duties upon Lisle to those then pertaining to the position of book-keeper, but not to impose duties upon him that would entirely change the nature and grade of his position in the bank, and enhance his responsibility, and thereby essentially increase the risk to the surety on his bond. This could only be done by the assent of the surety, and it is not pretended that such assent was ever obtained. And this is strictly in accordance with the principle maintained by this court in the case of *Strawbridge v. Baltimore etc. R. R. Co.*, 14 Md. 360; 71 Am. Dec. 541. In that case it was held that the surety was not exonerated; but it was so held because it was found that the nature of the agent's duties was not changed, and no new or different duty was imposed upon him by the alteration in the regulations of the company at the particular station. Indeed, it was conceded by the

court that if the employment and duties of the agent had been essentially changed, the surety would not have been liable; and no well-considered case has been cited that gives sanction to a different principle.

It follows from what we have said that the judgment below must be affirmed.

RELEASE OF SURETIES BY A CHANGE IN THE DUTIES OR OBLIGATIONS OF THE PRINCIPAL. — *Unsettling of Surety Strictly Construed.* — It is well-settled doctrine, in regard to which the authorities all agree, that a surety is entitled to stand upon the strict terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further: *Miller v. Stewart*, 9 Wheat. 680; *Strawbridge v. Baltimore etc. R. R. Co.*, 14 Md. 360; 74 Am. Dec. 541; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; 47 Am. Dec. 129; *Weed Sewing Machine Co. v. Winchel*, 107 Ind. 260. Sureties are favorites of the law, and their liability is not to be extended by implication beyond the terms of their contract, which contract is said to be *strictissimi juris*: *City of Lafayette v. James*, 92 Id. 241; 47 Am. Rep. 140; *Graeter v. De Wolf*, 112 Ind. 1; *Meadows v. State*, 114 Id. 537; *Detroit Sav. Bank v. Zeigler*, 49 Mich. 157; *Nichols v. Palmer*, 48 Wis. 110. And if the surety's contract be altered without his consent, although he may sustain no injury thereby, or the alteration may even be for his benefit, the contract ceases to be his, and with that ceases his obligation: *Ryan v. Morton*, 65 Tex. 258; *Bangs v. Strong*, 4 N. Y. 315; 42 Am. Dec. 64; *Steele v. Mills*, 68 Iowa, 406; *Weir Plow Co. v. Walmsley*, 110 Ind. 242; *Victor Sewing Machine Co. v. Scheffler*, 61 Cal. 530; *Polak v. Everett*, L. R. 1 Q. B. D. 669. But the rule which requires that a surety shall not be bound beyond the terms of his engagement does not require nor authorize a forced and unreasonable construction of the contract with a view of relieving the surety. His contract must be given a reasonable interpretation, in accordance with the established rules of construction: *Irwin v. Kilburn*, 104 Ind. 113; *Weir Plow Co. v. Walmsley*, 110 Id. 242; *Engler v. Peoples' Fire Ins. Co.*, 46 Md. 333. And the intention of the parties, as ascertained from the writings creating the obligation, must in all cases prevail: *W. W. Kimball Co. v. Baker*, 62 Wis. 526.

New Duties Imposed on Principal. — It is clear that where the bond is conditioned for the faithful performance of all duties that may be assigned to the principal, without limitation as to time, the sureties will not be discharged by reason of his default in a different branch of the service from that in which he was employed when they became his sureties: *Lane's Appeal*, 112 Pa. St. 499; *Fourth Nat. Bank v. Spinney*, 47 Hun, 293. So it is further held that sureties are never discharged by the imposition upon their principal of new duties which are distinct and separable from those protected by the guaranty, unless such new employment renders impossible or materially hinders or impedes the proper and just performance of the duties guaranteed: *Mayor etc. v. Kelly*, 98 N. Y. 467; 50 Am. Rep. 699; *Ryan v. Morton*, 65 Tex. 258; *Commonwealth v. Holmes*, 25 Gratt. 771; *People v. Vilas*, 36 N. Y. 459; 93 Am. Dec. 520. Thus sureties for the faithful performance of the duties of the book-keeper of a bank are held liable for his errors in that capacity, although he also performs the duties of teller, unless the errors were connected with or induced by the latter employment: *Home Sav-*

ings Bank v. Traube, 75 Mo. 199; 42 Am. Rep. 402; compare *Home Life Ins. Co. v. Potter*, 4 Mo. App. 594; *Detroit Savings Bank v. Zeigler*, 49 Mich. 157. But sureties will not be bound for the faithful performance of new duties subsequently imposed upon the principal, not appropriate to his employment, such duties not being regarded as within the contemplation of the sureties when the bond was executed: See *People v. Vilas*, 36 N. Y. 459; 93 Am. Dec. 520; *White v. East Saginaw*, 43 Mich. 567; *National etc. Banking Ass'n v. Conkling*, 90 N. Y. 116; *Fourth Nat. Bank v. Spinney*, 47 Hun, 293. And where a bond was executed for the faithful performance of duty by an "assistant clerk" in a bank, and he was employed as messenger, and afterward promoted to the next higher clerkship, and finally to the position of book-keeper, without the knowledge of his sureties, and in the last position was guilty of embezzlement, it was held that his sureties were not liable therefor: *Manufacturers' Nat. Bank etc. v. Dickerson*, 41 N. J. L. 448; 32 Am. Rep. 237. So where an agent was appointed to one of two ticket-offices of a railroad company at a certain city, and gave a bond for faithful performance of his duty, and subsequently the offices were consolidated and the duties of both were imposed on him, and his salary was increased, without the knowledge of his sureties, this was held to be such a change of the business and enlargement of the responsibilities of the agent and risks of the sureties as would discharge them: *Mumford v. Memphis etc. Ry Co.*, 2 Lea, 393; 31 Am. Rep. 616. And the general rule is, that sureties on a bond for the faithful performance of the duties of an agent are released from liability for the subsequent defaults of the agent, if the principal and agent, without the knowledge or consent of the sureties, materially alter the terms of the contract of agency: *Victor Sewing Machine Co. v. Schaeffer*, 61 Cal. 530; *Roberts v. Donovan*, 70 Id. 108. Thus the guaranty of the contract of an agent for the sale of machines in certain territory assigned to him by the contract does not extend to the transactions of the agent in other territory, after he had, at the request of his employer, abandoned the territory named, and his sureties are no longer bound: *Wheeler and Wilson Mfg. Co. v. Brown*, 65 Wis. 99; *White Sewing Machine Co. v. Mullins*, 41 Mich. 339. But if the bond reserves to the employer the right to change the character of the employment, within the scope of the business, the surety is not released by the withdrawal of the agent from the particular locality, and ordering him to sell elsewhere: *Howe Sewing Machine Co. v. Layman*, 88 Ill. 39. Permission given by principals to their agent to sell on credit, instead of for "cash in all cases," as the contract of agency originally required, clearly discharges the agent's guarantor who did not consent to such alteration: *Evans v. Lawton*, Cir. Ct. Mo., March, 1888. So where one contracts to sell goods on commission, to be shipped to him as ordered, and to account for money received, etc., a surety for the faithful performance of the contract is not liable for a default as to goods purchased by his principal, and in his possession, prior to the execution of the contract, and which are without his knowledge, by a subsequent agreement between the principal and the obligee, sold as furnished under the contract: *Weir Plow Co. v. Wakemley*, 110 Ind. 242. And if the contract forbids any shipments of goods to the agent in excess of a certain amount, the surety is released from all liability on the bond if shipments in excess thereof are made in violation of the contract: *W. W. Kimball Co. v. Baker*, 62 Wis. 526.

Immaterial Alterations in Principal's Contract.—The rule that any new contract upon a sufficient consideration, materially varying the original undertaking, and made between the principal parties without the knowledge and assent of the surety, will amount to a complete discharge of the surety,

has no application where the new contract is for any reason nugatory: *Steele v. Mills*, 68 Iowa, 406. And mere immaterial alterations of the original contract which do not change its legal effect, neither benefit nor injury being caused thereby, do not operate to discharge the surety: *Starr v. Blatner*, Sup. Ct. Iowa, Dec. 1888. So if a new contract between the principal parties adds no new terms to the original contract, and it is in no respect modified, and the last undertaking in no way increases the difficulty or expense, or tends to delay the work embraced in the first contract, the surety is not released: *Ryan v. Morton*, 65 Tex. 258.

Alteration of Principal's Contract by Legislation. — As to the liability of sureties upon official bonds, where the duties of the officer have been changed by legislation, there is some conflict in the authorities. But a well-sustained general principle deduced from the cases is, that any alteration, addition, or diminution of the duties of a public officer made by the legislature does not discharge his official bond, or the sureties thereon, so long as the duties required are the appropriate functions of the particular office. All such alterations are held to be within the contemplation of the parties executing the bond; but imposing duties of another description, and not appropriate to the office, would discharge sureties not coming within such contemplation: *Grover, J., in People v. Vilas*, 36 N. Y. 459; 93 Am. Dec. 520, and note 528, where the cases are collected and the subject discussed. And see, in support of this view, *Supervisors of Monroe v. Clarke*, 25 Hun, 282; *Mayor etc. v. Ryan*, 35 How. Pr. 408. But the alteration of a principal's contract by the order of the court will discharge a surety, as well as when the alteration is the voluntary act of the party: *Sage v. Strong*, 40 Wis. 575.

EARNSHAW v. SUN MUTUAL AID SOCIETY.

[68 MARYLAND, 465.]

MUTUAL AID SOCIETY. — ACTION AT LAW WILL LIE AGAINST MUTUAL AID SOCIETY FOR FAILURE TO MAKE ASSESSMENT to pay benefits as stipulated in the certificate of membership, upon a declaration alleging, with other proper averments, a failure to make the assessment, and averring that if such assessment had been duly made it would have resulted in the collection of the maximum sum payable under the certificate, and claiming that sum as damages for such failure, and the plaintiff would be entitled to recover what, upon proof, he could show such assessment would have yielded if it had been duly made.

CONTRACT LIMITATION. — WHERE CERTIFICATE OF MEMBERSHIP OF MUTUAL AID SOCIETY PROVIDES that suit for the recovery of any claim under the certificate must be commenced within six months after the death of the assured, and that failure to commence such suit within the time specified would be a waiver of all rights and claims under the certificate, and within that time an injunction enjoining payment to the beneficiary prevents him from bringing suit until after the expiration of the six months, such contract bar is absolutely removed, and cannot be revived, and suit may be brought at any time within the period prescribed by statute.

PRACTICE. — UNDER POWER VESTED BY MARYLAND CODE, article 5, section 16, the court will reverse the judgment appealed from, and award a new trial in a clear case, although the judgment ought to be affirmed.

P. H. Tuck and C. C. Magruder, for the appellants.

Frederick C. Cook, for the appellee.

MILLER, J. The instrument sued on in this case is a certificate of membership in a duly incorporated mutual aid society, which was issued to John Earnshaw on the 15th of May, 1882. It contains many conditions, only two of which have any bearing upon the questions presented by this appeal.

By the second condition (read as applicable to the circumstances of the present case), the corporation stipulated that the beneficiary designated in this certificate, by the member to whom it is issued, "shall be entitled" to "mortuary benefits to be assessed on the membership according to the table of rates and by-laws of the society, and the amount so collected to be paid at the office of the said society within ninety days after the proof of death shall have been satisfactorily established," provided the member shall have promptly paid all dues and assessments, and "provided, however, that in no case shall any benefit for this certificate exceed the sum of ten thousand dollars." And by the twelfth condition it was "expressly agreed and understood by and between the parties hereto that all suits at law or in equity for the recovery of any claims arising under this certificate must be commenced within six months from the date of such loss [which in this case was the death of the assured], and the failure to commence such suit within the time specified shall be a waiver of all rights and claims under this certificate."

When this suit was brought no assessment under the certificate had been made, and it is contended that until this was done, and they had the money in hand realized from the assessment, no action at law will lie against the society. But, in our opinion, under a declaration properly framed for that purpose, a suit at law can be maintained against the corporation for a refusal or neglect to make the assessment. It was their duty to make it, under the contract, and if, by breach of this duty, injury has resulted to the plaintiffs, a court of law is the most appropriate tribunal to afford them redress. There may be some difficulty as to the measure of damages in such an action, and in enforcing the judgment after it is recovered. In some cases, such contracts have been declared on in *assumpsit* as simple contracts of insurance for the maximum amount stated in them; and it has been held that the recovery

may be such amount, unless the defendant shows, by pleadings and proof, that such sum should be reduced: *Inseder's Ex'r v. Hartford Life etc. Ins. Co.*, 12 Fed. Rep. 465; *Elkhart Mut. Aid etc. Ass'n v. Houghton*, 103 Ind. 286. But in *Curtis v. Mutual Benefit Life Co.*, 48 Conn. 98, the action was in *assumpsit*, and the declaration assigned only the breach of a promise to pay the maximum amount, and the plaintiff recovered judgment. The case came before the supreme court by motion in error, bringing up for review a judgment of the trial court overruling a motion in arrest founded upon the insufficiency of the declaration. The court held the declaration to be fatally defective, because, among other things, it contained no allegation of any neglect to lay the assessment, and said: "The thousand dollars is not promised to be paid by the terms of the contract, but is mentioned merely as the limit of liability." The judgment below was accordingly reversed, but the case was remanded, in order, as we assume, that it might be retried upon an amended declaration. This case is certainly an authority for the position that an action at law, if brought in proper form, can be maintained against the company, and, to the extent above noted, takes, as we think, the more correct view of the law as to what the declaration should contain, and the extent of the recovery. We, however, entirely concur in the remarks made by the judge in 12 Fed. Rep. 472, to the effect that when a loss occurs under such a contract, and satisfactory proof thereof is made to the president and secretary, their duty to make the required assessment ensues according to the express terms of the contract, and if they fail to perform such duty, the other party is not to be left remediless; that there must be some one answerable at law for the contracts the corporation makes, and judgments on such contracts must be against the corporation; for otherwise, a policy like this would be of little worth, and such a scheme of insurance be a mere delusion and snare.

We think, then, that if there had been a declaration in this case, which, after other appropriate averments, had charged a failure or refusal to make the assessment, and then averred that if such assessment had been duly made it would have resulted in the collection of ten thousand dollars, and claimed that sum as damages for such failure or refusal, as substantially set forth in the amended declaration (which was exhibited to us in argument) in the case of Mrs. Osborne against this same society on another like certificate, in the court of

common pleas, it would have enabled the plaintiffs to recover what, upon proof, they could show such assessment would have yielded if it had been duly made. There might be some difficulty in obtaining the requisite proof, but the officers of the society could be called as witnesses, and made to disclose how many members there were at the time the assessment should have been made, and what was their ability to pay.

But we do not propose to decide in advance what may be legal and competent evidence on this subject, nor to say how judgment, if it should be recovered, could be enforced apart from the property which the corporation may own. All that we mean to say is, that an action at law upon a declaration of this character may be maintained. In fact, we have neither found nor been referred to any case in which it has been expressly decided that no action at law will lie against the corporation before an assessment has been made. In the cases of *Mutual Endowment Assessment Ass'n v. Essender*, 59 Md. 463, and *Yoe v. Benjamin C. Howard Mutual Benevolent Ass'n*, 63 Id. 86, the certificates were of the same character, and the actions were at law, but no objection was made to them on that ground. In *Eggleston v. Centennial Mutual Life Ass'n*, 18 Fed. Rep. 17, 19 Id. 201, the instrument contained a clause that "the only action maintainable upon this policy shall be to compel the association to levy the assessments herein agreed on," and the decisions were based exclusively on that clause. And in *Smith v. Covenant Mutual Benefit Ass'n*, 24 Id. 685, the opinion, as we read it, concedes that an action at law would lie if it was grounded upon a refusal by the company to make the assessment.

Another defense is, that the suit was not brought within six months, as provided in the twelfth clause of the certificate. This defense the court below sustained by ruling out the record of the equity suit in Prince George's County, which was offered in evidence by the plaintiffs, and in this we think there was error. The certificate is for the benefit of John Earnshaw as to one half, and of his son William as to the other half, and the plaintiffs in this action, which was brought on the 7th of August, 1886, are the four sons of the said John Earnshaw, who died on the 31st of July, 1883.

Now, by reference to the record referred to, it appears that on the 23d of June, 1883, shortly before his death, John Earnshaw assigned his interest in the certificate to his four sons in equal shares, and the society assented thereto, so that the en-

tire beneficial interest therein became vested in these plaintiffs. It also appears that John Earnshaw died insolvent, leaving a will by which he appointed his son Basil his executor, and that on the 30th of November, 1883, a creditors' bill was filed, to which all his sons, as well as this society, were made parties. This bill, among other things, assailed the validity of this assignment, upon the ground that it was made in fraud of the creditors of the deceased, and prayed for an injunction to restrain the sons from receiving from the society any portion of this certificate, and the society from paying over any portion thereof to them. The court, on the same day the bill was filed, granted the injunction as prayed, and it was duly served shortly thereafter. In their answer to this bill, which was filed on the 14th of February, 1884, the society say that the executor of John Earnshaw had never made any demand on them for payment, submit themselves to the jurisdiction of the court, and declare "their willingness to abide its decision as to which of the claimants may be entitled to the benefit of an assessment for said certificate, none having yet been made." In regard to this answer, it may be observed that their manifest willingness at that time to make an assessment whenever the parties entitled thereto should be ascertained is in strange contrast to their refusal to do so now, when there is no doubt as to the plaintiff's right to it. The case resulted in a decree passed on the 7th of March, 1885, which, among other things, vacated the assignment, appointed a receiver to collect the money from the society, and directed the latter to make the assessment, and pay the same over to him. But on appeal that part of the decree was reversed by this court (64 Md. 513) on the 5th of February, 1886, and on the remand of the case, the court below, on the 24th of April, 1886, passed an order discharging the receiver.

In our opinion, this injunction, so long as it remained in force, prohibited the plaintiffs from bringing an action on this certificate. Such an action, and the recovery of a judgment therein, where the complaining creditor would have no right to intervene and protect his interest as to the amount to be recovered, might, and probably would, have been injurious to him, and, as it seems to us, would have been such a violation of the spirit, if not the strict letter, of the injunction, such a breach of the mandate of the court, as would have rendered the plaintiffs liable to an attachment for contempt: 2 High on Injunctions, sec. 1446. The clause in question declares in

effect that suit "must be commenced within six months from the date of the loss," otherwise all rights and claims under the certificate shall be forfeited. This gave the plaintiffs six months from the date of the death of John Earnshaw within which to bring suit, and before that period had elapsed, the injunction came in and prevented them from suing. It is said, however, that counting the time from the death to the injunction, and adding to it the time after the injunction was dissolved to the date of the action, makes a much longer period than six months during which the plaintiffs were under no disability, and indeed, that two days more than six months had elapsed after the date of the reversing order of this court and the commencement of the action. All this is quite true; but what effect have these facts on the question under consideration? This period of six months is not a limitation prescribed by statute, but fixed by contract, and the distinction between these two classes of cases is very clearly drawn by the supreme court in *Semmes v. Hartford Ins. Co.*, 13 Wall. 158. In that case, there was a similar clause in a fire policy issued by a Connecticut company to a resident of Mississippi, providing that suit must be commenced "within twelve months next after the loss shall occur," and if commenced afterwards, the lapse of time shall be conclusive against the validity of the claim. After the loss, and before the expiration of the twelve months, the war intervened, and prevented the plaintiff from suing, but after the war closed he brought his suit in the circuit court for the district of Connecticut, and this contract bar was set up as a defense. The circuit court found that there was an interval between the commencement of the war and the date of the loss, which, added to the time between the close of the war and the commencement of the action, amounted to more than the twelve months allowed by the contract, and sustained the defense. But the supreme court held that this contract period does not open and expand like the period of limitations imposed by statute, so as to receive within it three or four years of legal disability created by the war, and then close together at each end of that period as though the war had never occurred; that the contract period relates to the twelve months next after the loss, and the court had no right, as in the case of a statute, to construe it into a number of days equal to twelve months made up of the days in a period of five years, in which the plaintiff could have lawfully commenced his suit; and that in such a case

where a cause intervenes which prevents the plaintiff from suing before the specified contract period expires, the contract bar cannot be afterwards revived, but is absolutely removed, and the plaintiff is then only bound by the limitation prescribed by statute. Deeming this view of the law to be just and reasonable, we adopt it as applicable to the present case, and as this certificate is under seal, the only statutory bar is twelve years. We therefore hold that this action is not barred either by contract or statute.

The court also excluded the certificate as evidence, upon the ground of variance between it and the contract declared on, and in this ruling we find no error. We have already expressed our views as to the form of declaration suitable to the case, and the one adopted by the pleader here is not only materially different, but is substantially like the one condemned in *Curtis v. Mutual Benefit Life Co.*, 48 Conn. 98, a case which we have approved. In Essender's case, no question was raised as to the sufficiency of the declaration there used, which counsel for appellants insist is substantially like the one they have adopted.

Affirmance of this ruling would seem to require an affirmance of the judgment, notwithstanding the error in the ruling on the other point, because if the contract sued on be out of the case, the plaintiffs have nothing to stand upon, and the error in the other ruling did them no harm. But conceding this to be so, and that the judgment ought to be affirmed, still we think it a clear case where a new trial ought to be had, notwithstanding the affirmance, and to that end we should use the power vested in this court by the code, article 5, section 16: *Kennerly's Ex'x v. Wilson*, 2 Md. 245. It is immaterial to the parties, therefore, whether we affirm and remand or reverse and remand, and we adopt the latter course.

Judgment reversed, and new trial awarded.

ACTION AT LAW IS PROPERLY MAINTAINABLE AGAINST MUTUAL BENEFIT ASSOCIATION for failure or refusal to make assessment to pay benefits as stipulated in the certificate of membership: *Newman v. Connecticut Mut. Ben. Ass'n*, 72 Iowa, 242; *Rainisbager v. Union Mut. Aid Ass'n*, 72 Id. 191.

CARLIN v. RITTER.

[66 MARYLAND, 472.]

LANDLORD AND TENANT. — INDEPENDENTLY OF ANY AGREEMENT, LAW IMPOSES upon every tenant, whether for life or for years, the obligation to treat the premises in such a manner that no substantial injury shall be done to them, so that they may revert to the lessor at the end of the term unimpaired by any willful or negligent conduct on his part.

AS BETWEEN LANDLORD AND TENANT, PROPERTY OF LATTER, IN FIXTURES of any description which he has annexed to the demised premises during his term, consists simply in the right or privilege of removing them; and if this is not exercised in due time, they become the property of the landlord.

BY TERM "FIXTURE," IN ITS LEGAL SENSE, IS MEANT something so attached to the realty as to become, for the time being, a part of the freehold, as contradistinguished from a mere chattel.

TENANT'S RIGHT TO REMOVE FIXTURES CONTINUES during his original term, and during such further period of possession by him as he holds the premises under a right to still consider himself as a tenant. But where a tenant quits possession, or surrenders the premises unqualifiedly to his landlord without removing or reserving his fixtures, he is understood to make a dereliction of them to his landlord.

RIGHT OF TENANT FROM YEAR TO YEAR TO REMOVE FIXTURES placed by him on the demised premises is lost, where, subsequently and during the tenancy, he receives notice to quit at the end of the current year, and does not so do, but obtains and accepts from his landlord a written lease of the premises, "together with all the rights, appurtenances, and privileges thereunto belonging or in any wise appertaining," for a term of five years, but containing no reservation of the right to remove the fixtures then on the premises.

FIXTURES. — **WOODEN STRUCTURE OR BUILDING MERELY RESTING BY ITS OWN WEIGHT** on flat stones laid upon the surface of the ground, and having no other foundation, is not a fixture.

BILL in equity to restrain the removal of fixtures. The facts appear in the opinion.

C. V. S. Levy and Milton G. Urner, for the appellant.

C. O. Keedy and William P. Maulsby, Jr., for the appellees.

MILLER, J. The facts material to the decision of the only important question in this case may be summarized thus: The owner of the City Hotel and grounds in Frederick had rented them for about twelve years prior to 1880 to a tenant at a yearly rent. This was simply a tenancy from year to year, with no written terms or conditions. During his holding under this tenancy, the tenant erected and placed in and on the premises certain buildings, structures, and fixtures, all of which are termed and claimed by the appellant as "trade fixtures," and are the subject of the present controversy. In

March, 1880, the landlord served notice in due form upon the tenant to quit at the end of the current year. He did not, however, quit in accordance with this notice, but obtained and accepted from his landlord a written lease of the premises for a term of five years from the 1st of October, 1880. This lease makes no reference whatever to the former tenancy. It describes the property leased as "the premises known as the City Hotel, situated on the north side of West Patrick Street, fronting sixty-one feet, more or less, in Fredericktown, Frederick County, state of Maryland, and running northwardly with equal width to the north wall of the stables fronting on Public Street, and belonging to said hotel, together with all the rights, appurtenances, and privileges thereunto belonging or in any wise appertaining." It then fixes the rent, which is made payable semi-annually, on the 1st of April and October in each and every year. The lessee then agrees to pay the water rent chargeable upon the premises, not to sell, assign, or dispose of his interest in the lease without the assent of the lessor, and to keep "the house and buildings attached and appertaining thereto furnished and supplied, and open at all proper times as a hotel as heretofore."

The tenant died in 1882, and by his will bequeathed his interest in this lease to his widow, the appellant. When the lease was about to expire, the appellant, who was proceeding to remove fixtures, was restrained from so doing by the bill in this case, which was filed by the landlord, and the decree appealed from makes the injunction perpetual as to the fixtures in controversy, which had been placed upon the premises by the tenant during his holding under his tenancy from year to year, and before this lease was executed and accepted by him. The question whether, under these circumstances, the appellant had the right to remove these fixtures is one of some importance, and a new one in this state. Our decisions have gone very far in including buildings and structures within the terms "trade fixtures," and in recognizing the right of the tenant to remove them: *Northern Central R'y Co. v. Canton Co.*, 30 Md. 352; but the precise question now before us has never hitherto arisen for adjudication in our courts. It has, however, frequently been adjudicated by courts of high authority in other jurisdictions.

Before considering the authorities bearing directly upon the point, it may be well to state some general propositions about which there seems to be no contrariety of judicial opinion.

We take it, then, to be clear that the descriptive terms in this lease are sufficient to convey to the lessee the fixtures in dispute, if they had been previously placed upon the premises by the landlord, or had been left there by a previous outgoing tenant. There is, it is true, no express covenant on the part of the lessee to keep the premises in repair, and restore them in good condition; yet we hold it to be well settled that, independently of any express agreement on the part of the tenant to that effect, and in the absence of the landlord's undertaking to repair, the law imposes upon every tenant, whether for life or for years, the obligation to treat the premises in such a manner that no substantial injury shall be done to them, so that they revert to the lessor at the end of the term, unimpaired by any willful or negligent conduct on his part: 1 Taylor on Landlord and Tenant, sec. 343; *United States v. Bostwick*, 94 U. S. 65.

If such, then, would have been the effect of this lease with reference to these fixtures in the case supposed, and if it had been made to any one else than the tenant in possession, is there anything in the circumstances of this case to give it a different operation? As between landlord and tenant, the property of the latter in "fixtures" of any description, which he has annexed to the demised premises during his term, consists simply in the right or privilege of removing them, and if this is not exercised in due time they become the property of the landlord. In using the term "fixture," we of course use it in its legal sense, as something so attached to the realty as to become for the time being a part of the freehold, and as contradistinguished from a mere chattel. When must this right or privilege be availed of? The general rule is, that it must be exercised during the term, or (as aptly stated by Parke, B., in *Mackintosh v. Trotter*, 8 Mees. & W. 185) "during what may for this purpose be considered as an excrescence on the term." In the last edition of his work on landlord and tenant, Mr. Taylor states the law thus: "The decisions also agree that whatever fixtures the tenant has a right to remove must be removed before his term expires, or at least before he quits possession; for if the tenant leaves the premises without removing them, and the landlord takes possession, they become the property of the landlord. The tenant's right to remove is rather considered a privilege allowed him than an absolute right to the things themselves. If he does not exercise the privilege before his interest expires, he cannot do it

afterwards; because the right to possess the land and the fixtures as part of the realty vests immediately in the landlord; and although the landlord has no right to complain if the land be restored to him in the same plight it was before he made the lease, yet if the land is suffered to return to him with additions and improvements, even by forfeiture or notice to quit, he has a right to consider them as part of his property. Nor is this any injustice to the tenant; since it is his own fault if he suffers the land to return to the landlord with the fixtures annexed. This rule had its foundation in the presumption of abandonment, arising from the conduct of the tenant in quitting the premises, and leaving his fixtures behind him; and hence the presumption could not arise, so long as the tenant retained actual possession, even so far as to become a trespasser. But the doctrine has been restricted by later cases to the right of removal only during the original term, and such further time as the lessee shall hold the premises under a right to consider himself a tenant": 2 Taylor on Landlord and Tenant, 8th ed., sec. 551. The same rule is laid down and the same general view of the authorities taken by the text-writers on fixtures: Tyler on Fixtures, c. 30, 31; Ewell on Fixtures, 137 et seq.; Amos and Ferard on Fixtures, 94; Gibbons on Fixtures, 39; Grady on Fixtures, 181.

Cases sometimes occur in which it is difficult to fix the precise time when the right of removal ceases, as where the term is of uncertain duration, or where a tenant has been allowed to hold over and become a tenant at will or sufferance, but no such difficulty is involved in the present case, and we need not therefore notice the authorities bearing upon that subject. Here the tenancy by the year was put an end to at a definite period by the notice to quit, and the tenant was left in no uncertainty as to when his term would expire.

Among the English authorities laying down the general rule as above stated is *Poole's Case*, 1 Salk. 368, in which Lord Holt said that during the term the soap-boiler (the tenant) might well remove the vats as trade fixtures; but after the term they became a gift in law to him in reversion, and are not removable. Another is the case of *Lee v. Risdon*, 7 Taunt. 191, in which Gibbs, C. J., after stating that the right as between landlord and tenant does not depend altogether upon the principle that the articles must continue in the state of chattels, says: "Many of these articles, though originally goods and chattels, yet when affixed by a tenant to the free-

hold, cease to be goods and chattels by becoming part of the freehold; and though it is in his power to reduce them to the state of goods and chattels again by severing them during his term, yet until they are severed they are a part of the freehold, as wainscots screwed to the wall, trees in a nursery ground, which, when severed, are chattels, but standing, are part of the freehold, certain grates, and the like. And unless the lessee uses during the term his continuing privilege to sever them, he cannot afterwards do it; and it never, I believe, was heard of that trover could be afterwards brought." He then refers to the well-settled doctrine that a stranger who without right severs and carries away fixtures commits a trespass, and is not guilty of a felony at common law.

The more modern English authorities have also followed the law as thus laid down, and we refer, as bearing directly upon the question we are now considering, to *Minshall v. Lloyd*, 2 Mees. & W. 450; *Mackintosh v. Trotter*, 8 Id. 184; *Weston v. Woodcock*, 7 Id. 14; *Davis v. Jones*, 2 Barn. & Ald. 165; *Lyde v. Russell*, 1 Barn. & Adol. 394; *Colegrave v. Dias Santos*, 2 Barn. & C. 76; *Roffey v. Henderson*, 17 Q. B. 574; *Hallen v. Runder*, 1 Crompt. M. & R. 266; *Wilde v. Waters*, 16 Com. B. 637; *Pitt v. Shew*, 4 Barn. & Ald. 206; *Pugh v. Arton*, L. R. 8 Eq. 626; *Leader v. Homewood*, 6 Com. B., N. S., 546. Other English decisions bearing upon the same subject are cited and commented upon by the elementary writers above referred to, and also in 2 Smith's Lead. Cas. 202. In fact, the limitation as to the time within which the tenant's right to remove fixtures under any circumstances endures, as pointed out in the earlier cases, was recognized by Lord Ellenborough in the leading case of *Elwes v. Maw*, 3 East, 38, in which the previous judgment of Lord Kenyon in *Penton v. Robart*, 2 Id. 88, is reviewed, and whatever doubts this latter case may have thrown upon the subject are removed by the later decisions, and especially by Baron Alderson in *Weston v. Woodcock*, *supra*, who says: "The rule to be collected from the several cases decided on this subject seems to be this: that the tenant's right to remove fixtures continues during his original term and during such further period of possession by him as he holds the premises under a right to still consider himself as tenant."

In this country the decisions are numerous, and almost if not entirely uniform in support of the same general rule. Among them we refer to *Davis v. Buffum*, 51 Me. 160; *Garfield v. Hapgood*, 17 Pick. 192; *Allen v. Kennedy*, 40 Ind. 142;

Davis v. Moss, 38 Pa. St. 346; *Beers v. St. John*, 16 Conn. 322; *Bliss v. Whitney*, 9 Allen, 114; 85 Am. Dec. 745; *State v. Elliott*, 11 N. H. 540; *Reynolds v. Shuler*, 5 Cow. 223; *Shepard v. Spaulding*, 4 Met. 416; and *Preston v. Briggs*, 16 Vt. 124. In the last cited case, Redfield, J., in a well-considered opinion, gives this terse, and as we think accurate, statement of the law: "It seems equally well settled that all fixtures for the time being are part of the freehold, and that if any right to remove them exists in the person erecting them, this must be exercised during the term of the tenant, and if not so done, the right to remove is lost, and trover cannot be maintained for a refusal to give them up." It is true that modern decisions have in the interest of trade greatly enlarged the number of movable or trade fixtures, but they agree with the earlier authorities in limiting the time within which the removal must take place. They hold that the interest which a tenant has in his fixtures consists in the right or privilege of removing them, and reducing them again to personal chattels, and that this is a right or privilege which may be lost by not being exercised in due time, or may be voluntarily surrendered, abandoned, or waived. The position sustained by the overwhelming weight of authority, both English and American, and ancient and modern, is, that where a tenant quits possession or surrenders the premises unqualifiedly to his landlord without removing or reserving his fixtures, he is understood to make a dereliction of them to his landlord; and the few cases in which the right of property in fixtures has been held to remain unchanged after the termination of the tenancy, and the surrender of possession of the premises by the tenant, rest upon the particular attendant circumstances, and may be regarded as exceptional, and they do not invalidate the general rule: Tyler on Fixtures, 453.

From the law as thus stated, it clearly follows that if the tenant in this case had, under the notice to quit given in 1880, removed from the premises without severing and taking with him the fixtures in question, they would have become the absolute property of the landlord. He did not, however, quit the possession, but what he did was this: he recognized the notice as putting an end to his tenancy by the year, and accepted from his landlord the lease above referred to, which took effect at the expiration of his yearly tenancy under the notice. The operative effect of this lease as a conveyance, and the implied obligation thereby cast upon the lessee, have

been already stated. It is a lease for a term of years, to take effect upon the expiration of the prior yearly tenancy, containing terms, conditions, and stipulations which did not pertain to the prior tenancy by the year, and which contained no reservation of the right to remove the fixtures then on the premises; and it was under this lease that the tenant continued in possession. The question, then, immediately before us is, What effect had the acceptance of this lease, and continuing in possession under it, upon the tenant's right to remove these trade fixtures? And here again, in answer to this question, all the elementary writers concur in laying down the proposition that if a tenant, having the right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises, without reservation or mention of any claim to such fixtures, and enters upon a new term thereunder, the right of removal is lost, notwithstanding his actual possession has been continuous. And the reason given is, because the fixtures set upon the premises at the time of the lease are part of the thing demised, and the tenant, by accepting a lease of the land without reserving his right to the fixtures, has acknowledged the right of his landlord to them, which he is afterwards estopped from denying: 2 Taylor on Landlord and Tenant, sec. 552; Ewell on Fixtures, 174, 175; Tyler on Fixtures, 437-439; Grady on Fixtures, 98; Gibbons on Fixtures, 43; Amos and Ferard on Fixtures, 117; 2 Smith's Lead. Cas., 8th Am. ed., 214.

The English cases usually cited in support of this position are *Fisherbert v. Shaw*, 1 H. Black. 258; *Heap v. Barton*, 74 Eng. Com. L. 273; and *Thrasher v. East London Water Works Co.*, 2 Barn. & C. 608. And the more recent case of *Sharp v. Milligan*, 23 Beav. 419, was a case where tenants in possession had agreed in writing to take a lease of the premises from their landlord for the term of twenty-one years. Specific performance of this agreement was decreed; and in settling the terms of the lease to be executed, the tenants insisted that it should be so framed as to protect their right to certain fixtures they had erected on the premises, and they asked this upon the conceded ground that if not thus protected they would be estopped by the lease from claiming their trade fixtures. But the master of the rolls (Sir John Romilly) refused their request, saying the tenants ought to have introduced the exceptions in the agreement if they intended their fixtures should not become the landlord's property. From these authorities

we cannot doubt that if this case were before an English court it would be promptly decided in favor of the landlord's right to these fixtures.

In this country, the question seems first to have arisen in the case of *Merritt v. Judd*, 14 Cal. 59, and there the court followed the English authorities, saying that upon the execution of the new lease the tenant was in the same situation as if the landlord, being seised of the land, had leased both land and fixtures to him. The same ruling was subsequently made by Brady, J., in *Abell v. Williams*, 3 Daly, 17, in the court of common pleas for the city and county of New York. A different opinion, however, was expressed by Reynolds, J., in the city court of Brooklyn, as reported in the case of *Devlin v. Dougherty*, 27 How. Pr. 461. But both these latter cases were decisions by courts of inferior jurisdiction. Finally the question came before the court of appeals of New York, in *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 193, where it was reasoned out and the authorities reviewed. "In reason and principle," says Allen, J., in delivering the opinion in that case, "the acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is in under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease, and returned to the premises. A lease of land and premises carries with it the buildings and fixtures on the premises, and the tenant accepting a lease of the premises without excepting the buildings takes a lease of the lands with the buildings and fixtures, and acknowledges the title of the landlord to both, and is estopped from controverting it." So in Massachusetts substantially the same doctrine was long ago announced by Chief Justice Shaw, in *Shepard v. Spaulding*, 4 Met. 416, the circumstances of the case differing only in the fact that there was an interval between the surrender of the interest under the first lease and the granting of the second when the lessor was in actual possession. Then comes the case of *Watriss v. National Bank of Cambridge*, 124 Mass. 571, 26 Am. Rep. 694, which, in its facts, is almost identical with

the one now before us, and in which the court, speaking by Endicott, J., reaffirms the same rule in a very carefully reasoned opinion.

Opposed to this strong array of authority in this country, and to the whole body of the English decisions, stands the case of *Kerr v. Kingsbury*, 89 Mich. 150; 83 Am. Rep. 382. This case was decided about the same time as the one last referred to in Massachusetts, and no reference is made in either to the other. The opinion was delivered by Judge Cooley, but we cannot go along with him in his reasoning. We are not able to discover anything "absurd" in the rule laid down by the other authorities, and certainly not when applied to a case like the one at bar. If it was the intention of the parties in this or any other similar case that the right to remove fixtures should continue, nothing was easier than to insert in the lease a clause to that effect; and it seems to us reasonable to infer from the absence of such a clause that it was their intention that this right should no longer continue. It is also a rational inference, if not a presumption, that the parties understood what they were doing, and what would be the legal construction and effect of the instrument they were executing. That the terms of this lease are broad enough to convey the fixtures, and did convey them, is a proposition about which we cannot entertain a doubt, and if this be so, we must assume the tenant knew it. It is also to be noted that this was the first written lease between the parties, and is not simply a renewal of an old one upon the same terms and conditions. Its office was not to effect an extension or a holding over under and upon the terms of an existing lease or a former tenancy, but to create a new tenancy upon new and different terms, and *non constat* the landlord would have granted or the tenant could have procured such a lease, except upon the condition that the fixtures should remain the property of the former, and the right to remove them be abandoned. At all events, such, in our opinion, is the construction and effect of this instrument, and we neither know of, nor can we recognize, any "public policy" which ought to induce the courts to place a different construction or give a different effect to a lease between landlord and tenant from that given to other contracts between other parties, or to set aside a well-settled rule or principle of law, in order to promote the interests of either party thereto.

We therefore affirm the decree so far as it decides that the

"trade fixtures" placed upon the premises prior to the year 1880 now belong to the landlord. This part of the decree is supported by a very able opinion of the court below found in the record.

We have encountered some difficulty in ascertaining from the record precisely what things the decree covers, because it does not, as it ought, contain a particular description and enumeration of them. Lists, however, have been furnished us by counsel on both sides, and as they are in substantial agreement, we shall take them as our guide.

The principal things enumerated in these lists are, the bake-house and oven, the fountain in the yard, the awning in front of the house, the furnace in the cellar for heating the building, the wash-tubs in the laundry, the grates for burning coal fastened into the fire-places in the rooms, the inside shutters to the windows, the counter in the office-rooms, the counter and shelving in the cigar-store, the counter, shelving, and mirrors in the bar-room (the mirrors being glasses framed and fastened into panels made in the wall, and not merely framed mirrors hung on hooks), the shelving in the pantry storeroom, and the inside iron doors in the stable. We have carefully examined the testimony in the record as to the construction, and the mode of annexation or attachment to the freehold, of all these things, and have also considered the obvious purpose with which they were put upon the premises, and are of opinion they are all "trade fixtures," the right to remove which the tenant, under the view we have above taken of the lease, has lost. So far, therefore, as the decree covers these things we affirm it.

But the lists also contain the ice-house, the cow-stable, and the carriage inclosure or covering. From the testimony, the ice-house appears to be simply a wooden structure or building resting by its own weight on flat stones laid upon the surface of the ground. The earth was not excavated for the purpose of holding the ice, nor was there any other foundation for the building than the stones referred to. *Wansbrough v. Maton*, 4 Ad. & E. 884, was a case where a wooden barn was erected on a foundation of brick and stones let into the ground, on which the barn rested by weight alone, and all the judges of the king's bench held it was not a fixture at all. Lord Denman, C. J., said: "Questions as to fixtures generally arise between the *prima facie* right of the landlord on the one hand, and exceptions in favor of trade or of tenants on the other. But

the first question must be, whether the erection be a part of the freehold. If it be not united to the freehold, we cannot say that it is a part of it; and here it is not so united, and therefore not a fixture." Many other authorities to the same effect might also be cited, but we deem this one sufficient. The cow-stable and carriage covering seem also to be wooden structures of the same character, and not more united to the freehold than the ice-house. So far, therefore, as the decree covers these structures we reverse it.

In the other case, in which Ritter alone is the appellee, precisely the same questions are involved, and the decree, being in the same form, must be disposed of in the same way.

Decrees affirmed in part and reversed in part, and causes remanded.

WHAT ARE FIXTURES, GENERALLY: *Potter v. Cromwell*, 40 N. Y. 287; 100 Am. Dec. 485, and note 492, 493; *Dudley v. Hurst*, 67 Md. 493; 1 Am. St. Rep. 368, and note; *Tyson v. Post*, 108 N. Y. 217; 2 Am. St. Rep. 410.

TENANT QUITTING PREMISES DURING OR AT END OF TERM MAY REMOVE SUCH FIXTURES, which he has placed thereon, as can be taken away without injury to the premises; and the law is particularly favorable to the tenant in this regard: *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 64; *Kelly v. Austin*, 46 Ill. 156; 92 Am. Dec. 243; *Conrad v. Saginaw*, 54 Mich. 249; 52 Am. Rep. 817.

TENANT HAS REASONABLE TIME WITHIN WHICH TO REMOVE FIXTURES, and if he is prevented by the landlord from removing them, he has a reasonable time after the interference so to do: *Goodman v. Hannibal etc. R. R. Co.*, 45 Mo. 33; 100 Am. Dec. 336. If, however, the tenant allows them to remain, his right will not extend to the term of a new lease not providing for the removal: *Hedderich v. Smith*, 103 Ind. 203; 53 Am. Rep. 509.

WILLIAMS v. HUNTINGTON.

[68 MARYLAND, 500.]

NEGOTIABLE INSTRUMENTS. — WHEN IT IS SHOWN IN ACTION ON PROMISSORY NOTE BY INDORSEE AGAINST MAKER that the note was obtained without consideration by the original payee, and that he fraudulently transferred it, contrary to the express protest of the maker, the burden is on the plaintiff, to entitle him to recover, to establish that he is the bona fide owner of the note, and that he acquired it for value before maturity, without notice or knowledge of any infirmity in its origin or its transfer.

MEAN FACT THAT NOTE HAS BEEN PURCHASED AT DISCOUNT will not, ordinarily, be evidence of bad faith, but where the discount is very large, that circumstance may be considered, in connection with all the other facts, in determining the question of the purchaser's good faith.

QUESTION OF FRAUD OR BAD FAITH ON PART OF HOLDER OF NOTE is to be determined from all the facts attending its purchase by him, without reference to the supposed or assumed conduct of others if situated as he was.

BONA FIDE PURCHASER OF COMMERCIAL PAPER FOR VALUE, BEFORE MATURITY, without notice or knowledge of any defects in it, acquires title thereto against the world, and his right of recovery thereon is not restricted to the sum actually paid by him, but he is entitled to recover the amount of the paper in full.

W. L. Marbury, and Charles Marshall, for the appellant.

J. Alexander Preston, for the appellee.

McSHERRY, J. The cause of action in this case is a promissory note dated February 20, 1884, signed by the appellant, and payable in fifteen months after its date to Andrew J. Guise and Company, for two thousand five hundred dollars. It was indorsed by the payee to the order of W. H. Harrison, from whom the appellee claims to have purchased it in good faith, without knowledge or notice of any infirmity, two months before its maturity, for \$1,850. Harrison indorsed the note in blank. Upon the trial in the court below, after all the evidence had been submitted, the appellee presented one prayer and the appellant three. The court of common pleas granted that of the appellee and rejected all of the appellant's. From these rulings, the judgment being against him, the defendant has appealed.

By the instruction granted at the instance of the appellee the jury were directed that if they should find that the defendant signed the note, that Guise indorsed and passed it to Harrison, that Harrison passed it to the plaintiff for a valuable consideration before said note became due, and that plaintiff purchased the note without notice of any fraud in the obtaining of said note or in the indorsement, or of any failure of consideration, then the plaintiff would be entitled to recover the full amount of the note; and that "there is no evidence in the case legally sufficient from which they can find that the plaintiff had any knowledge or notice of fraud or want of consideration in the making of said note, or in the indorsement thereof to said Harrison."

At the trial it was shown that this note, together with two others, each for the like amount, and another for eight hundred dollars, had been signed by the appellant and made payable to Guise, and that they had been delivered to the latter without any consideration whatever. According to one version of

the transaction, Guise was to raise the money on these notes, and after deducting five per cent commissions, he was to pay the net proceeds to the appellant; but according to Guise's own testimony, the appellant was indebted to him in the sum of twenty thousand dollars for alleged services rendered the appellant in some other business affair. The nature of these services is best stated in the language of Guise himself. He says: "On several occasions I had occasion to go into Mr. Williams's office, and I there met him [the appellant] one day, and he picked up off the table a piece of paper which afterwards proved to be a deed; I read it over,—it was a very short paper,—and he said his father and Mr. Orville Horwitz wanted him to sign that deed; I read it carefully, and I said: 'Ernie, if you do that, you will sign away your patrimony.' He said he would never do it unless he was crazy or drunk; the result was, that they did spirit him away to Europe; when he came back, he came right back to me; I advanced some more money; he told me about the young lady he was about to marry, and I think they both came to see me frequently." "And these are the services for which you claim twenty thousand dollars?" "I do." It appeared further that Guise was destitute of means, a borrower of small sums of money, and a man without any business occupation; though at one time he had been a court bailiff. Before he indorsed this note to Harrison he was warned by the appellant and by others not to negotiate it, and a demand was made upon him to surrender all of these notes because the whole transaction was a swindle, and because the appellant "had been trapped,—tricked into giving these notes without any due consideration." He even entered into negotiations with the wife of the appellant for the return of these notes in consideration of the payment by her to him of the sum of \$150. After this he made the indorsement to Harrison, but upon what consideration, if any, does not appear; and subsequently the appellee, after first being shown the note on this street, and after making inquiries from Guise in regard to it, purchased it. The appellee says that Harrison was "a kind of real estate broker, agent, and so on," and that he, the appellee, was engaged in the business of making books on horse-races, and that he bought paper and notes.

It has been explicitly decided by this court in *Totten v. Bucy*, 57 Md. 452, that where the defendant shows that the note sued on had been tainted in its inception or indorsement with fraud, or had been procured without consideration, or lost or stolen

before it came to the possession of the holder, the burden of proof is shifted, and it then is "incumbent upon the plaintiff to show that he acquired the note *bona fide*, for value, in the usual course of business, before maturity, and under circumstances that create no presumption that he knew of the existence of the facts that impeached the validity of the instrument." It is obvious from the brief statement which we have made of the facts bearing upon this branch of the case that there was evidence before the jury tending to show that the note was obtained without any consideration whatever, and further establishing the fact, without contradiction, that the note was passed by Guise fraudulently without authority, and indeed, contrary to the express protest of the appellant. The appellee was therefore obliged, before he could legally recover, to establish by proof that he was the *bona fide* owner of the note; that he acquired it for value before maturity, and without notice or knowledge of any infirmities in its origin or its transfer. In discharge of the burden thus cast upon him, the appellee offered his own testimony, and none other. Its credibility was wholly for the jury to determine. They were at liberty to disregard it altogether, if in their judgment it was intrinsically improbable, or if it was stamped with or inherently furnished indications of its unreliability. But the court in instructing the jury that to entitle the plaintiff to recover they must find that he was such *bona fide* purchaser before maturity for value, without notice; at the same time also explicitly told them that there was no evidence from which they could find that he had any notice or knowledge of fraud or want of consideration in the making of said note or in the indorsement thereof. The last clause of this instruction was erroneous, because there was evidence before the jury from which they might have legally inferred that the appellee was not the *bona fide* owner of the note for value before maturity and without notice. He was not engaged in the business of buying notes, and he did not acquire this one in the usual course of business. Gambling was his occupation; he bought but one other note about the same time he purchased this one, and it also was a note made by the appellant. He purchased both at very heavy discounts, one at nearly thirty per cent only two months before its maturity, and the other at over fifty per cent. Whilst the mere fact that a note has been purchased at a discount will not ordinarily be evidence of bad faith, yet where that discount is very large, the circumstance may

be considered in connection with all the other facts, in determining the question of the purchaser's good faith: *Stewart v. Town of Lansing*, 104 U. S. 505.

The appellee knew, he says, when buying the note purchased at a discount of over fifty per cent, that he was buying a lawsuit; though why he knew this he does not explain further than to state that it was a note payable on demand. But that fact did not of itself involve or imply a lawsuit. This statement of his is only capable of explanation upon the assumption that he had received information from Guise that there were such infirmities attaching to the note as would naturally cause payment to be resisted. He knew Guise, and he was aware that he was a man without means and without occupation, and that he was entirely unlikely to have honestly in his possession such a large amount of negotiable paper, or, having it, equally unlikely to dispose of it honestly so near its maturity at such ruinous rates of discount, at the very time he was assuring the appellee that the note "was as good as gold." The appellee also knew Harrison, and he knew him likewise to be so devoid of means as to be compelled to borrow small sums of money, and he must therefore have known that it was wholly improbable that would or could be the owner of a promissory note for so large an amount of money. The peculiar and unusual manner in which and the place where he was first approached by Harrison to buy the note, and the subsequent interviews at the appellee's house, and the visit by the latter to Guise before the purchase, strongly impress upon the whole transaction the characteristics of a fraudulent confederacy. And this is made more striking by the failure to produce Harrison as a witness, or to account for his absence. It was perfectly competent for the jury, by bringing these three parties together,—the payee, the indorsee, and the holder,—as the record presents them, to find, from the evidence before them, that the transfer of the note by Guise was a mere scheme and device to place the note in a position where it would be difficult to assail it; and to further find that Harrison and the appellee were participants in and parties to that scheme and that device. We therefore think that the concluding portion of the instruction was erroneous. The jury should have been allowed to pass upon the question of the appellee's *bona fides*, and upon the further question as to whether he had notice or knowledge of fraud in the inception and in the transfer of the note.

Inasmuch as the first prayer presented by the appellant placed the burden of proof upon the appellee to show *bona fides* in his purchase of the note, in the event of the jury finding the circumstances indicative of the existence of imperfections in its indorsement, we think, for the reasons already assigned, that it correctly presented the law of the case in this respect, and that it should consequently have been granted. It places the burden of proof where the law requires it to rest, under such circumstances, and forbids a recovery unless the holder of the note satisfied the jury that he was the *bona fide* owner for value before maturity, without notice or knowledge. There is no room to doubt the correctness of this prayer under the authority of *Totten v. Bucy*, 57 Md. 452, and the cases there referred to. The refusal of the court to grant it was such an error as requires a reversal of the judgment.

By the second prayer of the appellant the court was asked to instruct the jury to the effect that, in determining whether the plaintiff acted in good faith in purchasing the note, the jury might consider the circumstances in the knowledge of the plaintiff at that time, and if they should find that there was anything in those circumstances calculated to excite the suspicion of a reasonable man, who desired to avoid participation in the circulation of a fraudulent note, and calculated to cause such a man to make proper inquiry as to its *bona fides*, and that plaintiff failed to make such inquiries, that then they might infer want of good faith from such conduct. The action of the court in rejecting this prayer was without error. It is true that at one time this doctrine obtained the sanction of the courts: *Gill v. Cubitt*, 3 Barn. & C. 466; but it was soon questioned: *Backhouse v. Harrison*, 5 Barn. & Adol. 1098; and was finally distinctly overruled: *Goodman v. Harvey*, 4 Ad. & E. 870.

In *Murray v. Lardner*, 2 Wall. 110, the leading cases on both sides of this question are fully and ably reviewed. The supreme court states the law on this subject in these words: "Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. . . . The rule laid down in the class of cases of which *Gill v. Cubitt*, 3 Barn. & C. 466, is the antitype, is hard to comprehend and difficult to apply.

One innocent holder may be more or less suspicious under similar circumstances at one time than at another; and the same remark applies to prudent men. One prudent man may also suspect where another would not, and the standard of the jury may be higher or lower than that of other men equally prudent in the management of their affairs. The rule established by the other line of decisions had the advantage of greater clearness and directness." The same rule was applied by this court in *Totten v. Bucy*, 57 Md. 452, where it is said: "The question is not what facts the knowledge of which will or will not be sufficient to put the party on inquiry, but the question is, whether the party had knowledge of the infirmity of the note at the time of the transfer to him; or in other words, whether he procured the note in good faith for valuable consideration." See also *Com. & Farm. Nat. Bank v. First Nat. Bank*, 30 Id. 11. See also *Cromwell v. County of Sac*, 96 U. S. 51. The question is one of fraud or bad faith on the part of the taker of the note, and that is as susceptible of proof by circumstantial as by direct evidence. If it is sought to be established by the former medium of proof, its existence is simply a conclusion drawn from all the facts offered in evidence; and that conclusion cannot be made to depend upon any such uncertain and fluctuating standard as the supposed conduct, under similar circumstances, of prudent men, or the suspicions that such men might entertain. All the facts attending the transaction are admissible in evidence; and from those facts, without reference to the supposed or assumed conduct of others if situated in the same way, the jury are to find the fact alleged,—the imputed fraud or bad faith,—if it can be fairly and reasonably inferred therefrom. There was therefore no error committed by the rejection of this prayer.

By the third prayer, the court was asked to instruct the jury that if they should find that the note was procured by fraud, or was fraudulently negotiated, then, even though they should find that the plaintiff purchased the note before maturity, in good faith, for value, without notice as to such fraud, the plaintiff would only be entitled to recover the amount actually paid for the note, with interest in the discretion of the jury.

There was no error in the rejection of this prayer. It must be admitted, however, that there is some diversity of opinion with respect to the legal proposition it asserts. That proposition is broadly stated in 1 Daniel on Negotiable Instruments,

sec. 758, and in 2 Randolph on Commercial Paper, sec. 452; but it seems to us that the authorities quoted or referred to by these authors do not, with a few exceptions, support the text. In our opinion, the weight of authority and the reason of the law are decidedly the other way. It would protract this opinion to an unreasonable length if we were to review each of the cases relied on by the appellee, and each of those referred to by the text-writers; but it may be stated as the result of a careful examination of them that, with but few exceptions, they may be classified under three heads, viz.: 1. Cases where the note sued upon had been taken *bona fide* as collateral security for a less amount from a party who held it subject to equities or defenses; 2. Cases where the consideration agreed to be paid for the purchase of the note had been paid only in part, without notice or knowledge of the infirmities attaching to the note, and the residue of the consideration had been paid after the purchaser received such notice; and 3. Where the note has, under the provision of some statute, been declared void because tainted with usury.

Of the first class, the case of *Allaire v. Hartshorne*, 21 N. J. L. 663, 97 Am. Dec. 175, is an illustration. In that case, Hartshorne sued Allaire on a note of fifteen hundred dollars at ninety days, made by Allaire. The note had been misapplied by one Pettis, to whom it had been intrusted. He pledged it to the plaintiff as a security for \$750 borrowed on Hartshorne's check, and also as security for a four-hundred-dollar acceptance. The court charged the jury that if any consideration was given by the plaintiff for the note, "they should not limit their verdict to the amount so given, but should find the whole amount due on the face of the note." The case was carried to the court of errors and appeals of New Jersey. The court reversed the judgment, and held that, although a *bona fide* holder, Hartshorne could recover only the amount of his advances. The case of *Dresser v. Missouri and Iowa R'y Const. Co.*, 93 U. S. 92, belongs to the second class. In this class of cases, the courts have limited the recovery to the sum paid before the purchaser was chargeable with notice of the infirmities of the note; and have refused to allow a recovery of the sum paid after obtaining such notice, upon the ground that, as to the sum last paid, he was not a *bona fide* purchaser without notice.

The case of *Eastman v. Shaw*, 65 N. Y. 522, and the case of *Sauerwein v. Brunner*, 1 Harr. & G. 478, fall within the third class.

Neither of these classes of cases is applicable here. Those which are directly in point are so opposed to the fundamental principles governing the transfer of and the acquisition of title to commercial paper, and are so emphatically repudiated by the very highest authority, that we do not feel warranted in following them. Commercial paper may be sold and bought for what it will bring. One who buys it in good faith, before maturity, for value, without notice or knowledge of any defects in it, acquires a title to it good against the world: *Murray v. Lardner, supra*. The title thus purchased is not a title to a part of the note, but to the whole note. Such a purchaser becomes the absolute owner of it, with every incident and right of complete ownership. But the doctrine of the prayer we are considering limits and qualifies the purchaser's title and ownership, and though he may have acted in the most absolute good faith, restricts his right of recovery to the sum actually paid by him for the instrument. The adoption of such a doctrine would in a great measure fetter and impede the negotiability of all commercial paper sold at a discount, and would require the purchaser, for his own protection, to make inquiry in regard to the origin and transfer of the note, or to take it without such inquiry at his peril. This would be disastrous in its consequences, and is in direct opposition to the best considered cases. In the case of *Dresser v. Missouri and Iowa R'y Const. Co., supra*, suit was brought by a *bona fide* indorsee against the maker, and it was shown that the holder agreed to purchase before maturity and in good faith; that he paid part of the purchase-money, but before paying the residue he was made aware of the fraud through which the note was procured, but notwithstanding that knowledge, he paid the residue. He claimed, however, that he was entitled to recover in full; but he was restricted to a recovery of the amount paid before receiving such notice. The court uses this language: "The argument of the plaintiff in error is, that negotiable paper may be sold for such sum as the parties may agree upon, and that, whether such sum is large or small, the title to the entire paper passes to the purchaser. This is true, and if the plaintiff had bought the notes in suit for five hundred dollars before maturity, and without notice of any defense, and paid that sum, or given his negotiable note therefor, the authorities cited show that the whole interest in the notes would have passed to him, and he could have recovered the full amount due upon them."

This same question is also very fully considered by the supreme court of the United States in *Cromwell v. County of Sac*, 96 U. S. 51. That was a case where bonds issued by a county, and alleged to be tainted with fraud in their inception, were purchased in good faith without notice of the fraud, before maturity, for a sum below their par value; and it was insisted that the holder could only recover the amount paid by him, and not the face value. The court says: "We are of opinion that a purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against the maker, though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law; but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is, that the purchaser, at whatever price takes the benefit of the entire obligation of the maker. . . . This rule in no respect impinges upon the doctrine that one who makes only a loan upon such payer, or takes it as collateral security for a precedent debt, may be limited in his recovery to the amount advanced or secured." We do not deem it necessary to allude to other cases upon this subject.

For the errors indicated in granting the instruction of the appellee taking from the jury the question of the appellee's *bona fides* in acquiring the note, and in rejecting the first prayer of the appellant, the judgment must be reversed, and a new trial will be awarded.

MERE WANT OF CONSIDERATION FOR NEGOTIABLE INSTRUMENT WILL NOT AVOID against indorsee for value, before maturity, and without notice, and it is only in cases where a strong suspicion of fraud is raised that the plaintiff is bound to show under what circumstances he became the holder: *New Hanover Bank v. Bridgers*, 98 N. C. 67; 2 Am. St. Rep. 317, and note.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

EDWARDS *v.* BOWDEN.

[99 NORTH CAROLINA, 80.]

DEEDS. — **GENERAL RULE IS THAT DEED MUST BE UPHOLD** if possible, and the terms and phraseology of description will be interpreted to that end if this can reasonably be done consistently with the principles and rules of law.

DESCRIPTION IN DEED of "a tract of land lying in Greene County, North Carolina, adjoining the lands of Patrick Lynch and R. N. Bowden, situate on the east side of the road leading from Jerusalem Church to Patrick Lynch's, it being a portion of their part of the original Gray R. Pridger tract, and containing fifty acres," sufficiently points to a particular tract of land, so described as that it may be identified by proper parol evidence.

ACTION to foreclose a mortgage. The head-note and opinion state the case.

W. C. Monroe, for the plaintiffs.

MERRIMON, J. Generally, if the description of the land intended to be embraced, and the title thereto conveyed by the deed, is so indefinite or uncertain as that it fails to designate the land meant, the deed is inoperative and void. It is, however, a general rule that the deed must be upheld if possible, and the terms and phraseology of description will be interpreted with that view and to that end if this can reasonably be done. The court will effectuate the lawful purpose of deeds and other instruments if this can be done consistently with the principles and rules of law applicable: *Proctor v. Pool*, 4 Dev. 370.

We think that the description in the deed in question of the land embraced by it sufficiently points to a particular tract of land,—not an indefinite and undefined part of a tract, but a certain tract so described as that it may be ascertained.

If the words "it being a portion of their part of the original Gray R. Pridger tract, and containing fifty acres," be omitted from the description, it would be substantially like that held to be sufficient in *Kitchen v. Herring*, 7 Ired. Eq. 190. The words in that case were "a certain tract of land lying on the southwest side of Black River, adjoining the lands of William Haffland and Martial," and in *McLawhorn v. Worthington*, 98 N. C. 199, the description held to be sufficient was, "all that tract or parcel of land situate in said county, and bounded as follows: Adjoining the lands of Augustus Braxton, James Hines, T. N. Manning, Cobb Tripp, and others, containing 360 acres, more or less." So that if the words of description were only these: "A tract of land lying in Greene County, North Carolina, adjoining the lands of Patrick Lynch, and R. N. Bowden, situate on the east side of the road leading from Jerusalem Church to Patrick Lynch's," there could be no reasonable question as to the sufficiency of the description. Then do the additional words, "it [the land] being a portion of their part [that is, the part of Patrick Lynch and R. N. Bowden] of the original Gray R. Pridger tract, and containing fifty acres," control the description, and render it insufficient? We think not.

The last-recited words were not the principal or leading words of description, but intended simply to give the description more particularity by designating the land as "a tract lying," etc., "it being a portion [a designated, described portion] of their part," etc.; that is, a tract of fifty acres identified and taken from "their part of the original," etc. Hence the land is described as "a tract," a body of land having distinctive identity, "adjoining the lands of," etc. How could it adjoin the lands of the persons named if it were not designated by some boundary? If it were a confused, undescribed portion of "their part of the original Gray R. Pridger tract," it is not at all probable that it would have been described as "a tract of land lying," etc., adjoining "their" land.

The interpretation of the description of the land we have thus given, it seems to us, is reasonable, and it renders the deed operative, if the plaintiff can on the trial, by proper evidence,

identify the land as described in the deed. He must give evidence of a tract of land as designated.

Error.

RESPECTING DESCRIPTIONS IN DEEDS, THAT IS CERTAIN WHICH MAY BE MADE CERTAIN: *Nixon v. Porter*, 34 Miss. 697; 69 Am. Dec. 408; *Pursley v. Hayes*, 22 Iowa, 11; 92 Am. Dec. 350; and any description will be held good that will enable one to identify the land: *Nelson v. Brodbeck*, 44 Mo. 596; 100 Am. Dec. 323; *Green v. Jordan*, 83 Ala. 220; 3 Am. St. Rep. 711.

PITT v. MOORE.

[99 NORTH CAROLINA, 85.]

SPECIFIC PERFORMANCE. — PAROL CONTRACT TO CONVEY LAND WILL NOT BE SPECIFICALLY ENFORCED, unless the defendant, in his answer, submits to perform the parol agreement as charged in the complaint, or unless he admits it, and neither by plea nor answer insists upon the statute of frauds.

ALTHOUGH PAROL AGREEMENT TO SELL LAND WILL NOT BE ENFORCED, yet the party repudiating the contract will not be allowed to enjoy the benefits of permanent improvements put upon the land by one relying on the contract without compensation for the additional value arising from such improvements.

PARTIES. — RIGHTS OF MORTGAGEES OF LANDS MAY BE AFFECTED in an action for an accounting in which it may become necessary to sell the lands and distribute the proceeds, and they ought, therefore, to be made parties to such action.

CIVIL action brought by M. B. Pitt, executor of the will of James Lawrence, deceased, against E. L. Moore.

J. L. Bridgers, for the appellant.

J. B. Batchelor, for the respondent.

DAVIS, J. It is alleged and admitted that James Lawrence, late of Edgecombe, died in said county in 1884, leaving a last will and testament, which was duly proved, and the plaintiff, executor therein named, duly qualified as such, and that, by the terms of said will, he is authorized to sell the interest of his testator in the property mentioned in the pleadings. It also appears that, at the time of the death of the testator, and for some time prior thereto, he and the defendant were partners and tenants in common of certain mill property, situated near the village of Sparta, in Edgecombe County, each owning one-half interest.

It is further alleged, among other things, that the testator and defendant carried on a general milling business at the

mill owned by them, and that, for the better utilization of the property, the mill-house and a double tenement-house used therewith "were moved about forty yards up stream, where a new dam had been built for more than twenty years, which said dam is upon the lands of the said Moore, on the one side of the stream, and the lands of Lawrence and Moore on the other, and was built at a place on the stream formerly covered by the mill-pond, and the mill was built on the land of Moore, immediately below said dam, and above the old dam, and the opposite side of said stream belongs to Moore and Lawrence, the mill-wheel now being at a place in the mill-pond as it was constructed before the old dam broke and the new one built; he (Moore) agreeing and contracting, in consideration of a payment made by said Lawrence to him, to convey by deed a title in fee to one-half interest in the site or parcel of land on which said houses were located after the changes mentioned,—being about one tenth of an acre,—so that it should become the common property of the partnership."

The complaint further alleges that the defendant promised, from time to time, to convey to the testator his half-interest in the new site, as set forth, and has repeatedly admitted the payment therefor by said testator, but he never conveyed said title in the lifetime of the testator, and that since his death the plaintiff executor has demanded of the defendant "that he convey said title to those lawfully entitled thereto, which he has refused to do, alleging that the entire property was his, and that he did not intend to account for it in any way."

The complaint also alleges that the defendant is insolvent; that up to the time of the death of the testator he and the defendant divided the tolls weekly; that the plaintiff has demanded that the defendant continue to make such a division until the property could be divided by sale, but that the defendant refuses to so divide, but takes and appropriates the entire tolls, etc., to the irreparable damage of the estate of the plaintiff's testator, and he asks for judgment declaring that the estate of his testator is entitled to an interest of one half in the property; that a sale be ordered and a receiver appointed, etc.

The answer, so far as it is material, states, in substance, that after operating the mill by plaintiff's testator and defendant on the first site until about eight years prior to this action,

"the mill-house and machinery in it was, by their joint action, removed up the stream, and put upon lands then in possession of the defendant, which he had thereafter conveyed by mortgage to A. T. Bruce & Co., and that said Bruce & Co. had no notice of such removal until it was accomplished, and they are still the owners of the same as mortgagees"; that neither before the removal of the mill, nor at the time of its removal, was anything said by plaintiff's testator to the defendant about purchasing the land, and the first time the subject was mentioned between them was about a year after the removal, when the testator said to the defendant: "We have never agreed about the price of the land where the mill now sets"; to which defendant replied that he "was ready to fix the price and execute the deed for it"; when the plaintiff's testator said "it made no difference about a deed, so he kept it as long as he lived, he was satisfied." They continued thereafter to operate the mill by managers of their selection, and to divide the proceeds equally, till the death of the testator. He describes the location, and says that when removed every part of the mill was put upon his land, and denies that he ever promised, except as stated, "to make title to plaintiff's testator for one-half interest in the present mill site, or that he has ever admitted that he has received payment therefor," etc.

He denies that he is insolvent. It was agreed that the mortgage to Bruce & Co. was executed subsequent to the erection of the mill on the present site, and that they knew nothing of any agreement between plaintiff's testator and the defendant, and that the following, which shall be taken in lieu of a copy of the mortgage, is all therein pertaining to the mill property in controversy, to wit: "Also my one-half interest in the five acres of land sold by said Moore to George C. Sugg, and afterwards sold by his administratrix, including the large grist-mill and fixtures, and all the personal property used therewith, known as the Sparta Mills."

There was no evidence in writing of any agreement or contract in regard to the removal or erection of the mill upon the land of the defendant, and he objected to the first and sixth issues, as there was no evidence, other than parol, bearing upon them; and he insisted that, whether claiming under the parol contract for the purchase of an interest in the land, or under a license, the plaintiff must fail.

The following are the issues submitted (the first and sixth

objected to by defendant), with the responses thereto, and judgment of the court:—

"1. Did the defendant promise to execute a deed to Lawrence for one half of the present mill site? A. Yes.

"2. Did Lawrence pay the defendant for the one-half interest? A. No.

"3. If not, what is the value of one half of the land on which the mill sets? A. Ten dollars.

"4. What is the value of the permanent improvements put upon the land of the defendant by the defendant and Lawrence as copartners? A. Fifteen hundred dollars.

"5. Did Lawrence contribute his half of the expenses incurred by the erection of the same? A. Yes.

"6. Was the mill moved by Lawrence and defendant upon defendant's land with the understanding and agreement that the land was to be partnership property upon the payment by Lawrence of one half the value of the land? A. Yes.

"Upon the verdict the plaintiff moved for the judgment of the court declaring a lien upon the land upon which the mill sets, and the permanent improvements thereon, to the extent of one half the value of said permanent improvements as found by the jury, and the appointment of a commissioner to sell the land and improvements to enforce the lien, unless the defendant shall in the mean time pay off and discharge the same. Upon consideration, it is adjudged by the court that the motion is disallowed, and the defendant moving for judgment *non obstante veredicto*, it is adjudged by the court that the defendant go without day."

1. Is the plaintiff entitled to have a specific performance of the promise made by the defendant to execute to his testator a deed for one half of the mill site?

The plaintiff insists that, though not in writing, the contract as alleged is substantially admitted by the defendant, and the equity of the plaintiff not denied, and that the objection that it was not in writing, but by parol, could only be taken by answer, and as the statute was not set up as a defense in the answer, that question is not before the court.

We take a different view.

The defendant does not admit any payment or performance, or part performance, by the testator, so far as it relates to any contract or agreement for the purchase of or title to the land to which the mill was moved.

There is not only the fact, as found, that the testator, Law-

rence, never paid the defendant for the one-half interest, but the plaintiff fails to set out the consideration or price to be paid, which is an essential and necessary part of the contract. It is true, the jury finds that there was an agreement to convey, and that the land was to be partnership property, and that it was worth ten dollars; but what was the contract price? None is alleged in the complaint, and none seems to have been agreed on. The law required the contract to be in writing, and there is nothing to distinguish it from *Gulley v. Macy*, 84 N. C. 434, and like cases, in which it is held that the courts will not enforce parol agreements for the sale of land, unless in cases when the defendant in his answer submits to perform the parol contract as charged in the complaint, "or when he admits it, and neither by plea nor answer insists on the statute."

2. Is the defendant liable to the estate of plaintiff's testator for the permanent improvements put upon the land jointly by the testator and the defendant, to the extent of the one half of the costs thereof paid by said testator?

Whatever may have been the ancient rule, it is now well settled by many decisions, from *Baker v. Carson*, 1 Dev. & B. Eq. 381, in which there was a divided court, but Ruffin, C. J., and Gaston, J., concurring, and *Albee v. Griffin*, 2 Id. 9, by a unanimous court, to *Hedgepeth v. Rose*, 95 N. C. 41, that where the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another by a parol contract or agreement which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched, "without compensation for the additional value which these improvements have conferred upon the property," and it rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own act.

In the case before us, the land on which the mill was situated was of little value,—only ten dollars,—the improvements put upon it more valuable,—worth, by the finding of the jury, fifteen hundred dollars,—and put up by the plaintiff's testator and the defendant at their joint expense, with the understanding and agreement that they should own the property as partners, and they continued to deal with it as partnership property down to the death of the testator. While this agree-

ment cannot be enforced as a valid contract for the sale of land, equity will not permit the defendant to enjoy the benefits of its without compensation. It was not by his mere license that the improvements were put upon his land,—it was coupled with an expenditure of money by which the land was improved, and therefore coupled with an interest, which gave to the testator rights of which the defendant cannot deprive him by a repudiation of his parol agreement: *Will. & Tar. R. R. Co. v. Battle*, 66 N. C. 541.

In *Bridges v. Purcell*, 1 Dev. & B. 492, it is left an open question "whether a license to do an act which, in its consequences, permanently affects the property of him who gives it, when so acted on that what is done cannot be conveniently undone, may be regarded as a grantee of an interest to the extent of the consequences thereby authorized, and therefore not revocable; or whether the license does not necessarily imply a permission for the thing done to remain, notwithstanding the continuing consequences; and therefore the licensor, on a principle of good faith, may be forbidden to withdraw it, without indemnifying him who trusted thereto." The settlement of these questions was not necessary, as Judge Gaston said, to the determination of that case, but we think that they have been settled, by adjudications since, in favor of the equity of those who, acting in good faith, have expended money or labor in improving the property of others in whom they trusted. Such, we think, is the equity of the plaintiff in this case.

He is entitled to compensation to the extent of one half of the value added to the land in question by the permanent improvements made thereon.

3. It is conceded that by the terms of the testator's will the plaintiff has authority to make sale of his interest in the mill, but the defendant objects that the plaintiff sets up a partnership between his testator and the defendant, and that this action cannot be maintained, because the property, being partnership property, vests in the surviving partner under section 1326 of the code.

The action is substantially for the settlement of the partnership, and the plaintiff is entitled to have an account, and to receive one half of the net profits accrued since the last settlement between the defendant and his testator, and one half of the enhanced value to the land by reason of the improvements, and this relief is within the scope of the plaintiff's prayer, and warranted by his complaint.

4. It appears that after the erection of the mill, A. T. Bruce & Co. became the mortgagees of the defendant's "one-half interest" in the property in question, and as they thereby became the legal owners of defendant's interest, and their rights may be affected by the settlement, they ought to be made parties to this action.

There is error, and this will be certified to the end that further proceedings may be had in accordance with this opinion.

RIGHT OF PERSON TO RECOVER DAMAGES FOR FAILURE OF OTHER PARTY TO PERFORM CONTRACT NOT VALID UNDER THE STATUTE OF FRAUDS, AS WHERE IMPROVEMENTS ARE PUT ON LAND, OR OTHER ACTS DONE RELYING UPON SUBCONTRACTS.—By the rigid rules of the common law, whoever put improvements upon real estate did so at his peril. No matter though he acted in good faith and in the honest conviction that the land was his, whenever any other party judicially established his title to the land, such party had a right to all the improvements situated upon it: *Parsons v. Moses*, 16 Iowa, 440; *Lanquest v. Ten Eyck*, 40 Id. 213; *Russell v. Blake*, 2 Pick. 507; *Humphreys v. Newman*, 51 Me. 40; *Bonner v. Wiggins*, 52 Tex. 125. But the rule of the civil law was more liberal, and permitted one who had made permanent improvements on land in his possession, under the *bona fide* belief that he was the owner of it, to exact full compensation for the value of such improvements, less the value of the use of the land, before he could be compelled to surrender it: *Putnam v. Ritchie*, 6 Paige, 390, 404. Courts of equity adopted this rule of the civil law, and first applied it in cases where the true owner came into equity as a complainant seeking an account against the purchaser for mesne profits after a recovery of the land in an action at law, or when such owner had only an equitable title, and was compelled to sue in equity for a recovery of the land. In these cases, the court refused its aid to the complainant, except upon the terms of compensation to the *bona fide* purchaser for his improvements: *Putnam v. Ritchie*, 6 Paige, 390, 404; *Green v. Biddle*, 8 Wheat. 77; *Bomberger v. Turner*, 13 Ohio St. 263; 82 Am. Dec. 438; *Parsons v. Moses*, 16 Iowa, 440; *Smith v. Drake*, 23 N. J. Eq. 302; *Salé v. Crutchfield*, 8 Bash. 636; *Miner v. Beekman*, 50 N. Y. 337. The rule thus adopted in equity was subsequently imported into the common-law courts in the equitable action of trespass on the case for mesne profits, so far as to limit the recovery in such action to the excess of profits after deducting the value of the permanent improvements made on the land by the defendant in good faith, and in the honest belief that the land was his: *Dawson v. Graw*, 29 W. Va. 333, 336; *Putnam v. Tyler*, 117 Pa. St. 570, 588; *Walker v. Humbert*, 55 Id. 407; *Jackson v. Loomis*, 4 Cow. 168; 15 Am. Dec. 347; *Wood v. Wood*, 83 N. Y. 575; *Davis v. Louk*, 30 Wis. 308; *Potts v. Cullum*, 68 Ill. 217. The equity of the *bona fide* possessor who had made lasting and permanent improvements upon lands which turned out to be another's was so strong and persuasive as to force its recognition to this partial extent by courts of law without the aid of statute: *Parsons v. Moses*, 16 Iowa, 440, 446. And the whole doctrine of compensation for improvements, except as fixed and prescribed by statute, commonly known as "betterment acts," is an outgrowth of equity, and rests on equitable principles: *Barton v. Land Co.*, 27 Kan. 634.

Apert from local statutes, that above stated was the full extent of the

relief to a *bona fide* purchaser in this country, until, in 1841, Judge Story decided in favor of the power of courts of equity to grant affirmative relief at the suit of a *bona fide* possessor against the true owner: *Bright v. Boyd*, 1 Story, 478. And after an additional hearing of the same case, he restated his opinion, "affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge before he is to be restored to his original rights in the land": *Bright v. Boyd*, 2 Story, 605. See review of this case in note to *Scott v. Dunn*, 1 Dev. & B. Eq. 425; 30 Am. Dec. 178. The views of Judge Story, in *Bright v. Boyd*, *supra*, were adopted in *Herring v. Pollard*, 4 Humph. 362, 40 Am. Dec. 653, the court holding that a party making improvements upon the lands of another, his possession being *bona fide* under a contract to purchase, which is void because not in writing, can recover in a court of equity the value of such improvements. The same was held in *Mathews v. Davis*, 6 Humph. 324, and the doctrine was approved by the same court in the following cases: *Humphreys v. Holtsinger*, 3 Sneed, 229; *Rhea v. Allison*, 3 Head, 178; *Rainer v. Huddleston*, 4 Heisk. 226; *Smoot v. Smoot*, 12 Lea, 274. So the doctrine has been recognized and adopted by the highest courts of some of the other states: See *Valle v. Fleming*, 29 Mo. 152; 77 Am. Dec. 557; *Union Hall v. Morrison*, 39 Md. 281; *Dora v. Dunham*, 24 Tex. 366; *Hatcher v. Briggs*, 6 Or. 31; *McGee v. Wallis*, 57 Miss. 598; 34 Am. Rep. 483. And the supreme court of North Carolina in several cases has recognized the doctrine of betterments to the extent of the enhanced value of the land, where the contract for the sale of land has been rescinded, or the title has failed by reason of the contract not being in writing: See *Wetherell v. Gorman*, 74 N. C. 603; *Hill v. Brower*, 76 Id. 124; *Smith v. Stewart*, 83 Id. 406, and other decisions cited in the principal case. Nevertheless, it is said that the opinion of Judge Story, in *Bright v. Boyd*, *supra*, "though often favorably quoted, cannot be considered as the established law of this country, apart from the statute, because it has rarely had occasion to be reviewed, inasmuch as the 'betterment acts' have become the predominant statutory system of the country": Shipman, J., in *Griswold v. Bragg*, 18 Blatchf. 202; 48 Conn. 577; and see *Taylor v. Foster*, 22 Ohio St. 255, 267. And the rule that the value of improvements can be used at the utmost only as a set-off against the rents and profits claimed, is well sustained by authority: See *Wood v. Wood*, 83 N. Y. 575; *Pulaski County v. State*, 42 Ark. 118; *Davis v. Louk*, 30 Wis. 308; *Putnam v. Tyler*, 117 Pa. St. 570, 588. Nor will a court of equity give to an occupant compensation for improvements, unless there are circumstances attending his possession which affect the conscience of the owner, and impose an obligation upon him to pay for them or allow for their value against a demand for the use of the property: See *Putnam v. Ritchie*, 6 Paige, 390; *McLaughlin v. Barnum*, 31 Md. 425; *Mill v. Hill*, 3 H. L. Cas. 828; *Foley v. Kirk*, 33 N. J. Eq. 171; *Cole v. Johnson*, 53 Miss. 94; *Goodwin v. Lyon*, 4 Port. 297. A purchaser of land by parol, who has failed to comply with his contract, and abandoned the possession without the fault of the vendor, is not entitled to recover for improvements put by him upon the land: *Rainer v. Huddleston*, 4 Heisk. 223. And improvements and expenditures made on the faith of a contract within the statute of frauds, with the knowledge of the owner, give no equity to the purchaser to retain possession until he is repaid: *Harden v. Hays*, 9 Pa. St. 151; and see *Norris*

v. *Hoyt*, 18 Cal. 218. A parol contract to pay for the improvements upon land is not within the statute of frauds as a sale of an interest in land; *Lower v. Winters*, 7 Cow. 263; *Godeffroy v. Caldwell*, 2 Cal. 489; 56 Am. Dec. 360; *Zickafosse v. Hulick*, 1 Morris, 175; 39 Am. Dec. 458. And it is held that if a party makes a parol agreement for the sale of land, and puts the purchaser in possession, and afterwards takes advantage of the fact that the contract is void by the statute of frauds, he is bound to pay for the improvements made by the occupant thus put in possession: *Thowen v. Lea*, 26 Tex. 612; see also *Harris v. Harris*, 70 Pa. St. 170; and if in such an agreement the vendor stipulates to pay for the improvements, but makes no contract as to rents, and on his refusal to complete the agreement he is sued for the improvements, he cannot complain that the rents of the premises were not allowed him as a set-off to the improvements: *Thowen v. Lea*, 26 Tex. 612.

BRICKHOUSE v. SUTTON.

[99 NORTH CAROLINA, 108.]

JURISDICTION.—NORTH CAROLINA STATUTE (Acts 1870-71, c. 108, sec. 1) which cures irregularities as to the jurisdiction of the courts in respect to special proceedings begun before its enactment is valid.

RECORD IN RECORD BY COURT THAT DEFENDANTS IN PROCEEDING NAMED HAD BEEN SERVED WITH PROCESS is evidence that they had been so served, and that the court had jurisdiction of their persons. Such record cannot be attacked collaterally for irregularity or for fraud. If assailed for irregularity, a motion in the proceeding would be the proper remedy; if for fraud, and the proceeding be ended, the remedy is by an independent action.

VOID JUDGMENT.—IT IS ONLY WHEN COURT OF GENERAL JURISDICTION undertakes to grant a judgment in an action or proceeding where it has not jurisdiction of the parties or the subject-matter of the action, and this appears from the record, by its terms or necessary implication, or by the absence of something essential, that the judgment will be absolutely void, and may, therefore, be disregarded and treated as a nullity everywhere. In such case, the action of the court would be *coram non judice*.

DOWER.—STATUTE DOES NOT REQUIRE SHERIFF TO ATTEST "WRIT OF DOWER," or the report of the jury assigning it; and if it were otherwise, the attestation of the report by the deputy would not render the proceeding void, but only irregular in that respect.

REGULARLY, RETURN OF PROCESS SHOULD BE MADE in the name of the sheriff by the deputy, and whether a return by the deputy in his own name is sufficient, *quere*.

CIVIL action brought by J. G. Brickhouse to recover the possession of land, claiming a life estate therein for the life of Elizabeth Sutton.

Pruden and Vann, and R. P. Felton, for the appellant.

E. F. Aydlott, for the respondent.

AM. ST. REP., VOL. VI.—82

MERRIMON, J. The action is brought to recover possession of the land described in the complaint. The plaintiff claims a life estate therein for the life of Elizabeth Sutton, by virtue of a deed of conveyance executed by her to him on the twenty-sixth day of March, 1880, she being the widow and doweress of Henderson Sutton, who died intestate in December, 1868. The defendants are the heirs at law of the latter.

At February term, 1869, of the superior court of the county of Tyrrell, the widow named filed her petition in that court to obtain dower in the land mentioned. Process issued, returnable to the next fall term of the court, to make the heirs at law parties defendant to such application to obtain dower. This process was directed to the heirs at law of the intestate, summoning them each personally, and the same purported to be returned executed thus: "To hand August 12, 1869, J. W. Woodhouse, Deputy Sheriff; executed August 24, 1869, J. W. Woodhouse, Deputy Sheriff."

At the spring term, 1869, the court made an order in the proceeding to obtain dower, whereof the following is a copy:—

"It appearing to the court that the defendants have been served with process and copies of the petition, and they failing to appear and plead or demur, it is adjudged and decreed by the court that the petition be taken *pro confesso*. And the cause thereupon coming on to be heard, it is adjudged and decreed that the petitioner is entitled to dower in the lands in the petition mentioned. And it is further ordered that the following named persons, to wit, Samuel Norman, Asa Etheridge, John Patrick, Edmund McClees, Marcus D. Newberry, be appointed commissioners to lay off and assign to the petitioner one-third part of said lands, including the mansion and other houses, and put her in possession of the same; and let a writ of dower issue accordingly."

Thereupon a proper writ issued to the sheriff, commanding him to summon the commissioners, freeholders named in the above order, to proceed to allot to the petitioner dower in the lands in question. These freeholders did assign dower, and made report and return of their action, describing the land so set apart, and that they had placed the petitioner in possession. The report recites that the freeholders were duly sworn, but it does not appear who administered the oath to them. They were attended by a deputy sheriff, and he signed the report and return thus: "Attest: B. Jones, Deputy Sheriff."

The plaintiff claims as the grantee of Elizabeth Sutton, who

is admitted to be still living. And while he admits that Elizabeth Sutton was not entitled to dower otherwise in the land in controversy, he insists that the defendants are estopped by a record offered by him from claiming her right to dower in said land, and the plaintiff's right, as her grantee, to recover possession during her lifetime.

The defendants claim that their ancestor, Henderson Sutton, above named, in his lifetime conveyed the land to persons named, who afterwards conveyed the same in fee to the defendant, Debora C. Sutton, under whom they claim.

It was admitted that Elizabeth was not entitled to dower unless by estoppel of record; that Henderson acquired the land before the year 1860, and was married to Elizabeth before that year.

As bearing on the question of estoppel, defendants contended: 1. That the superior court had no jurisdiction in 1869 to assign dower; 2. That the service of the subpoena, appearing by indorsement thereon, was not valid; 3. That the attestation of writ of dower by B. Jones, deputy sheriff, was not valid.

Upon intimation from the court that the jury would be instructed that, upon the whole of the testimony and the facts admitted, the plaintiff could not recover, the plaintiff suffered a judgment of nonsuit, and appealed.

The objection that the superior courts did not have jurisdiction of the proceedings to obtain dower in 1869 cannot be sustained. The statute (Acts 1868-69, c. 93, sec. 40; Battle's Revision, c. 117, sec. 9; Code, sec. 2111) expressly conferred such jurisdiction upon them. Soon after the enactment of the statute just cited some doubt prevailed as to whether or not such proceeding should begin in the court of probate, or in the superior court before the clerk thereof, or before the court in term time. This doubt grew out of the novel and not very clearly defined duties of the clerk of the court. It gave rise to some conflict of judicial decision, and the result was the legislature enacted the statute (Acts 1870-71, c. 108, sec. 1; Battle's Revision, c. 17, secs. 425, 426) which cures irregularities as to the jurisdiction of the courts in respect to proceedings to obtain dower, and other like special proceedings begun before its enactment. This statute has been repeatedly upheld as valid: *Ward v. Lowndes*, 96 N. C. 367, and the cases there cited.

We need not decide whether the return of the original process,—the "subpoena,"—in the proceeding mentioned of

Elizabeth Sutton to obtain dower, in the name of the deputy sheriff, and not in the name of the sheriff by the deputy, was sufficient of itself or not, because in our judgment the ascertainment of the fact, and the recital of the same in the record by the court, that the defendants in that proceeding named had "been served with process and copies of the petition" therein, was altogether sufficient evidence—certainly *prima facie*—that the defendants had been served with process, and that the court got and had jurisdiction of them. It appears from the proceeding that the court had jurisdiction of the parties and the subject-matter thereof. The proceeding, the order and judgments therein, were therefore apparently regular and valid, not void,—at most, in any case, only voidable. So that they could not be disregarded and treated in this action as void, nor could they be attacked collaterally for irregularity or for fraud. To correct or set them aside for irregularity, a motion in the proceeding would be a proper remedy; and as the proceeding is ended, it could be attacked for fraud only by an independent action: *Fowler v. Poor*, 93 N. C. 466, and cases there cited.

It is the service of the process for the purpose by some officer or person authorized by law to receive it, ordinarily the sheriff, that causes the jurisdiction of the court to attach to and lay hold and give the court control of the party to be brought into court in the action or proceeding. The return of the process, including a minute in writing indicating what action the officer took under and in pursuance of it, made by the sheriff, when it purports to be served, is evidence—strong evidence—*prima facie* that it was served, and that the jurisdiction of the court has attached to the party. The service thus appearing to have been made is regular and efficient, and prevails until it shall be overthrown by some proper proceeding for the purpose. The court is presumed by law to be cognizant and to take judicial notice of the officer to whom it directs its precepts, and of his returns of the same. The presumption is that the return is true, else the court would not act upon it; and when the court, acting upon the return, proceeds in the action or proceeding, the strong presumption is that it had jurisdiction of the parties; its action is at least apparently regular, and must prevail until reversed or set aside in some proper way.

The return of process in question was made by a person professing to be and acting as deputy sheriff in his own name.

This was irregular, at least. The return should have been made in the name of the sheriff by the deputy. But the service was unquestionably sufficient and regular if made by the deputy. Such service gave the court jurisdiction of the parties served, and the irregularity was in the return, not in the service. There was the absence of the regular evidence of the service of which the court could take judicial notice. Such evidence would have been the return in the name of the sheriff by the deputy. The defective return might have been amended upon proper application, if the facts warranted such action. But the court might have made inquiry and ascertained that service was actually made by the deputy sheriff. Indeed, it appears from the record that it did; it is recited therein, and in effect adjudged, that service of process was made on the defendants. It would be more satisfactory if the recital in the record of the fact of service had been fuller, and made some reference to the evidence of service, but this is not essential. Every intendment is in favor of the action of the court and its sufficiency.

The ascertainment and recital of facts in the record by the court imports verity and binding effect, and must be so treated for all proper purposes of the action, until in some proper way the action of the court shall be successfully impeached. Thus in this case it must be taken that the court, acting upon proper evidence, ascertained and set forth in the record the important fact that the defendants in the proceeding in question were served with the process against them,—that is, served regularly, effectually.

And so, also, where the parties go into court and submit themselves to its jurisdiction for a proper purpose, and this fact is recited in the record, such record including the recitals import verity and binding effect upon the parties everywhere; they cannot be heard to allege the contrary or attack the judgment in a collateral proceeding or action. This must be so, else the records of courts would have neither certainty, permanency, nor efficiency; they would be snares to the innocent oftentimes, and utterly untrustworthy.

It is only when a court of general jurisdiction undertakes to grant a judgment in an action or proceeding where it has not jurisdiction of the parties or the subject-matter of the action, and this appears from the record by its terms or necessary implication, or by the absence of something essential, that the judgment will be absolutely void, and have no effect,

and may therefore be disregarded and treated as a nullity everywhere. In that case, the action of the court would be *coram non judge*: *Doyle v. Brown*, 72 N. C. 393; *Spillman v. Williams*, 91 Id. 483, and numerous cases there cited; *Morrow v. Weed*, 4 Iowa, 77; 66 Am. Dec. 122; *Wade on Notice*, sec. 1870.

As to the third ground of exception, the statute does not require the sheriff to attest the "writ of dower," or the report of the jury assigning the same; but if it were otherwise, the attestation of the report by the deputy would not render the proceeding void; it could only render it in such respect irregular and erroneous.

The principal question argued before us was that as to the sufficiency of the return of the process in question by the deputy sheriff in his own name, and not in that of the sheriff by him. As it appears above that we have not found it necessary to decide this question, not entirely free from doubt; regularly, as we have said, returns should be made in the name of the sheriff by the deputy.

It was held in *Holding v. Holding*, 2 L. R. 440, that the return of a subpoena in the name of the deputy was insufficient. In *McMurphey v. Campbell*, 1 Hayw. (N. C.), 181, such return was held to be sufficient, although irregular; and in *State v. Johnston*, 1 Id. 293, its sufficiency was doubted. In *Debeon v. Murphy*, 1 Dev. & B. 586, the court held that such return was not such as could be taken notice of judicially, as that of an officer recognized by the law. See *Murfree on Sheriffs*, secs. 76, 856. We cite these authorities here to help the convenience of reference in future cases in which they may be pertinent.

The judgment of nonsuit must be set aside, and the action tried according to law.

POWER OF LEGISLATURE TO MAKE VOID JUDICIAL PROCEEDINGS VALID: See *Walpole v. Elliott*, 18 Ind. 258; 81 Am. Dec. 358.

JUDGMENT OF COURT HAVING NEITHER JURISDICTION OF THE PERSON nor of the subject-matter is void: *Butcher v. Brownsville Bank*, 2 Kan. 70; 83 Am. Dec. 446; *Hahn v. Kelly*, 94 Cal. 391; 94 Am. Dec. 742, and note.

WHERE JUDGMENT RECITES SERVICE OF PROCESS, such recital is conclusive: See note to *Hahn v. Kelly*, 94 Am. Dec. 765 et seq.; and see the note to *Mella v. Simmons*, 30 Am. Rep. 748-752.

NEWBY v. HARRELL.

[99 NORTH CAROLINA, 140.]

PARTNERSHIP. — GENERAL RULE IS, THAT ONE PARTNER CANNOT MAINTAIN ACTION AGAINST HIS COPARTNER to recover money which might be placed as an item in the partnership account until after a settlement of all partnership business; but he may, before such settlement, maintain an action against his copartner for the destruction of the joint property, or its wrongful conversion, or for injury to his individual property used in the business, if such injury is the result of the negligence or tort of the copartner.

PLEADING AND PRACTICE — COURT IS NOT REQUIRED TO GIVE INSTRUCTIONS, THOUGH PROPER, and such as the party is entitled to, in the very terms asked; and if such as are asked for to which the party is entitled are embodied substantially in the charge as given, it is sufficient.

EXCEPTION TO ENTIRE CHARGE OF COURT as set out in the record, without specifying the errors therein or the grounds of exception, is too indefinite, and cannot be considered.

FACTS IN PARTICULAR CASE NOT CONSTITUTING SUFFICIENT GROUND of challenge to juror, within the provision of the North Carolina code, section 1733, that "it shall be a disqualification and ground of challenge to any tales-juror that such juror has acted in the same court as grand, petit, or tales juror within two years next preceeding such term of the court."

NEGLECTANCE. — IF ONE USES MACHINERY IN HIS BUSINESS, AND FAILS to provide it with proper appliances to insure in its operation the safety of the property of others, he is liable for any loss resulting from such failure, unless the party sustaining the loss contributed thereto by his own lack of care.

T. G. Skinner and J. H. Blount, for the respondent.

John Gatling and Leroy Smith, for the appellants.

DAVIS, J. In August, 1883, the plaintiff and defendants entered into an agreement "to run a gin at G. D. Newby's house, jointly."

The defendants were to furnish an engine and fireman, and two hands to perform any work in connection with the ginning. The plaintiff was to furnish a house and gin and press, and three hands, fit up the gin and press and house, at his own expense, but the defendants to furnish "the money, if he should need it, to run the whole business, at eight per cent interest upon the amount used."

The plaintiff was also to furnish "his own oil and fixtures to engine," etc. The plaintiff was to have control, and "give it his attention," and the gin was to be responsible for repairs done on the same. They were to divide the profits equally.

They continued to operate under this contract till November 6, 1885, with one modification, to wit, in the summer of

1884, the plaintiff, being about to leave his farm to live in Hertford, told defendants that he would have to hire some one to take his place, to which they agreed, and he did hire a man, but the defendants having complained that he was not competent, the plaintiff discharged him, and employed another at once, who remained till the fire. The engine and appliances in use at the time of the fire were the same that had been used constantly since the contract was entered into. The property was destroyed by fire about November 5, 1885.

The defendants introduced evidence tending to show that the engine and appliances, including spark-arrester and smoke-stack, were complete, and of the proper kind; that they did not live at or near the gin, and that no notice or complaint of any defect in the engine, spark-arrester, or other appliance was made to them till two days before the fire, when they were informed by the men in charge in Newby's place that the engine needed work; that they immediately sent one Coppage, who was a competent machinist, to repair it, who, on the day before the fire, put it in proper condition, and no other complaint was made.

They further offered evidence tending to show that the house furnished by plaintiff was not a proper and sufficient one; that the roof was decayed and inflammable; that they complained of its condition, but that the plaintiff failed to remedy the same, and the fire occurred because of its condition.

The plaintiff offered evidence tending to show there was no spark-arrester, and that the fire was the result of its absence; that notice and complaint was made to the defendants of the condition of the engine a month before they sent Coppage to repair it, and that Coppage was incompetent; and that when such complaint was made, the defendant S. B. Harrell promised to provide the engine with a spark-arrester at once, and failed to do so at all; that the plaintiff knew nothing about machinery; that the defendants had sole management of the engine; that the defendant C. W. Harrell was present at the fire; that the house and roof were repaired at the commencement of the business, and were in proper condition, and that no complaint was made by the defendants that they were not in proper condition. The only negligence of which any evidence was offered by plaintiff was as to the engine.

The defendants asked the court to charge as follows:—

“That the plaintiff and defendants were partners at the

time of the fire, and the plaintiff cannot recover in this action; that if the plaintiff knew that there was no spark-arrester, and that there was danger because there was none, and failed to notify the defendants, but continued, with this knowledge, to use engine without it, he cannot recover in this action; nor can he recover, though he notified the defendants, if the defendants, on receiving the information, did all that a prudent man ought to have done to have the danger removed.

"By the terms of the contract, the control of the business and engine was in the plaintiff; and if he failed to notify the defendants that the engine was dangerous because of the absence of the spark-arrester, or to remedy the same, but continued to work it in that condition, he cannot recover in this action.

"Although the partners retained the title of the property, yet during the continuance of the copartnership the property belonged to the copartnership, and was under control of the plaintiff.

"If the plaintiff occupied and acquiesced in the engine and appliances furnished by defendants, with full knowledge of these defects, if they existed, he cannot recover in this action."

The court refused to give instructions requested, except so far as they are embodied in the charge given as hereinafter set out. Defendants excepted.

The court charged as follows:—

"1. The legal effect of the contract is, the plaintiff and defendants are copartners in the business of ginning cotton, the plaintiff retaining title to his gin and gin-house, except, so far as it is necessary for the business to be engaged in, to place the property under control of the copartnership, and the defendant, in like manner, retaining title to the engine and fixtures.

"2. The peculiar provisions of this contract of copartnership, as between the parties themselves, leaves the parties each the owners of the property used in the copartnership, except so far as it was needed for the business of the copartnership; and the defendants are responsible to the plaintiff for the want of the care which a man of ordinary prudence would use; and on the other hand, the liability of the defendants for the want of due care would be removed if the injury to the plaintiff was the result of his own negligence or want of care.

"3. It then becomes necessary for you to determine how the

truth is in regard to the negligence or want of proper care on the part of the defendants, and therefore the first issue is submitted to you; and also to determine whether the plaintiff, by want of proper care, has contributed to the alleged injury, and therefore the second issue is submitted to you.

"4. If one uses in his business machines, the machines so used ought to be such as are properly supplied with proper appliances to provide for safety in the operation of them. If, then, in operating steam-engines with greater security from fire, spark-arresters are necessary, and men of ordinary prudence in business use them, the defendants used their engine without such arrester, they would, in that regard, be guilty of negligence. It is not necessary that the appliances should be of any particular kind or in any particular place; but they must be of such kind, and placed in such position, as are provided by men of ordinary prudence in machines of the same kind. If the defendants used such appliances for arresting sparks and diminishing the danger of fire as are used by men of ordinary prudence, then they would not be guilty of negligence on that account.

"5. If the defendants did not use due care, they would not be liable for loss unless the loss arose from that negligence. It then becomes necessary to determine whether plaintiff's loss was caused by defendants' negligence, and the plaintiff must satisfy you that the fire originated from the engine of the defendants, and that the engine did not have the proper appliances for diminishing the danger of fire.

"6. The contract gave to the plaintiff the control of the business, at least to the extent of general supervision; and if the plaintiff, with the consent of the defendants, employed another to do the work required of him, it would not affect the right of the plaintiff to recover, if the work was done as required of the plaintiff.

"7. Although the defendants may have been guilty of negligence, if the plaintiff was guilty of contributory negligence he would not be entitled to recover any damages. If the loss was the direct result of plaintiff's want of due care, then the loss is the result of his own negligence, and he is said to be guilty of contributory negligence.

"8. If the plaintiff and defendants were partners, and the plaintiff had general oversight of the business; if the steam-engine furnished by the defendants was defective because there was no spark-arrester, and the plaintiff knew there was

danger because there was no spark-arrester, and knowing this danger, he continued to use the engine in that condition, he was not using due care, and if the loss was the direct result of such want of care, it was contributory negligence; but if he or his agent notified the defendant of the defective engine, and after having been notified of the defect, the defendants failed to have the defect repaired,—then it would not be contributory negligence on the part of the plaintiff.

"9. If the defendants were notified of the defect in the engine, and failed to repair or have it repaired within reasonable time, they would be guilty of negligence, and if loss result from such negligence, then the defendants are liable. A failure to repair for a day or two would not be unreasonable delay. A failure to repair for a month would be unreasonable delay."

The defendants objected to charges 1, 2, 3, 4, 5, 6, 7, 8, and 9, etc., as given.

One Boyce, a juror, was challenged by defendants for cause, that he had served on a jury in this court within two years. It appeared that Boyce was of the regular panel, and had been engaged as a juror in the trial of a capital felony on the day before. When the verdict in the capital felony was rendered the night before, the judge said to the jurors: "The talesmen are discharged, and such of the regular panel as wish to do so may go home to night, and will not be required to return. Those who remain will be in attendance upon the court to-morrow morning."

The juror Boyce did not go home, and was in the court next morning and took his seat in the jury-box, having been called in by the sheriff. The court held that Boyce was a regular juror, and that the ground of challenge was not sufficient. The defendants excepted, and exhausted their challenges.

The defendants asked the court to submit the following issues to the jury:—

"1. Did defendants, by negligently failing to furnish a sufficient spark-arrester and smoke-stack to their engine, set fire to and burn defendants' property? Did plaintiff accept as sufficient the engine and appliances furnished by the defendants, including spark-arrester and smoke-stack?"

"2. Did the plaintiff and defendants engage in ginning cotton in 1883, under the contract set out in the complaint?"

"3. How much does plaintiff owe defendants?"

The court refused these issues, and submitted the following:—

"1. Did defendants set fire to and burn the property of the plaintiff mentioned in the complaint by their carelessness?

"2. Did plaintiff by his conduct contribute to the alleged injury?

"3. What damages has plaintiff sustained by reason of defendants' negligence?"

Defendants excepted.

The response to the first issue was "Yes," to the second "No," and to the third "\$1,660."

1. The first exception is to the refusal of the court to give the instructions asked for.

The court is not required to give instructions, though proper and such as the party is entitled to, in the very terms asked; and if such as are asked for to which the party is entitled are embodied, substantially, in the charge as given, it is not error. In this case, the instructions asked for were substantially given, except the first, and that presents the question: Can one partner maintain an action against a copartner for injury to his separate and individual property used in the copartnership business, if such injury is the result of negligence or tort of the copartner?

It may be laid down as a general rule that before one partner can sue another partner at law the settlement of the firm must be complete, and his right to recover only arises after a settlement of all partnership business: *Graham v. Holt*, 3 Ired. 300; or, as laid down by Collyer on Partnership, sec. 289, one partner cannot maintain an action against a copartner to recover money when the sum sought to be recovered might be placed as an item in the partnership account. Among the exceptions to the general rule is the right of one partner to maintain an action against another for the destruction of the joint property, or its wrongful conversion: *Lucas v. Wasson*, 3 Dev. 398; Collyer on Partnership, sec. 382. If one partner may maintain an action against another for the destruction of the joint property, *a fortiori* may the action be maintained when the property destroyed is the individual property of a partner used in the business of the partnership?

2. The defendants' second exception is to the entire charge of the court as set out in the record, without specifying or pointing out the errors therein, or the grounds of exception. This is too indefinite; but we have examined the charge of his honor *seriatim*, in view of the conflicting evidence, and no error appears to us.

3. The third exception cannot be maintained. Boyce was a regular juror, and there was nothing disqualifying in the facts settled.

4. Exception is taken to the judgment, but upon what ground is not stated. It follows the verdict, and we can see no objection to it.

Affirmed.

ONE USING HAZARDOUS MATERIALS OR INSTRUMENTS ON HIS PREMISES is liable for any injury occasioned to the property of another, if there is no fault on the part of the latter: *Gressell v. Housatonic R. R. Co.*, 54 Conn. 447; 1 Am. St. Rep. 138.

COURT IS NOT BOUND TO GIVE INSTRUCTION IN LANGUAGE OF REQUEST: *State v. Hoxie*, 15 R. I. 1; 2 Am. St. Rep. 838; and error cannot be assigned for refusal so to charge if the substance of the instruction is given: *Kendrick v. Towle*, 60 Mich. 363; 1 Am. St. Rep. 526. Requests to charge should, however, generally be given in the language of the request, if they state the law correctly, and are clear, terse, and comprehensive: *Cook v. Brown*, 62 Mich. 473; 4 Am. St. Rep. 870.

ACTIONS BETWEEN PARTNERS: See the note to *Cowser v. Prince*, 12 Am. Dec. 649 et seq. *Assumpsit* will not generally lie by partner against his copartner in respect to matters connected with the partnership business: *Bruce v. Hastings*, 41 Vt. 380; 98 Am. Dec. 592. A partner may sue his copartner for injury to the firm business: *Boughner v. Black*, 83 Ky. 521; 4 Am. St. Rep. 174.

TAYLOR v. SEABOARD AND ROANOKE R. R. Co.

[99 NORTH CAROLINA, 185.]

CONTRACTS.—IT IS COMPETENT FOR PARTIES TO SIMPLE CONTRACT IN WRITING, BEFORE ANY BREACH of its provisions, either altogether to waive, dissolve, or abandon it, or to add to, change, or modify it, or vary or qualify its terms, and thus make it a new one, which must in such case be proved partly by the written and partly by the subsequent unwritten parol contract which has thus been incorporated into and made part of the original one.

WAIVER OF CONDITION IN PASSENGER CONTRACT "TICKET."—CONTRACT INDORSED ON RAILROAD PASSENGER TICKET for passage to a certain point and return, entered into between the railroad company and a passenger, containing a requirement that the ticket should be stamped by the company's agent at the point of destination, is a simple contract in writing, and such requirement may be waived by parol. To show such waiver, evidence that a person stamped the ticket for the return trip at a station other than that designated in the contract, and that such person was an authorized agent of the company, is admissible.

Two actions consolidated by order of the court. The actions were brought by John Taylor and his wife against the Seaboard and Roanoke Railroad Company to recover damages

for wrongful expulsion from one of the passenger-cars of the defendant.

D. L. Russell, for the appellants.

Thomas W. Strange, for the respondent.

MERRIMON, J. This case embraces two actions consolidated by order of the court. The plaintiffs respectively brought them to recover damages from the defendant, occasioned by their wrongful expulsion from one of the passenger-cars of the defendant by its agents while regularly carrying passengers over its road from Portsmouth, in the state of Virginia, to Weldon, in this state.

The following is a copy of so much of the case stated on appeal as is necessary to a proper understanding of the opinion of the court:—

“On the trial, the plaintiff John Taylor was introduced as a witness in behalf of plaintiffs, who testified that he and his wife purchased, at Wilmington, North Carolina, at a price less than the regular fare from Wilmington, North Carolina, to Old Point, Virginia, and return, two certain tickets (which were shown to witness, identified, and put in evidence), one of the tickets being signed by himself, and the other by his wife; that in buying the tickets, he and his wife did not expect or intend to stop at Old Point, but to go directly by there to New York, intending to purchase at Old Point or Norfolk other tickets to New York; that plaintiffs stopped a day in Norfolk, and did not go to Old Point at all, being informed by a fellow-passenger that they could have their tickets stamped at Norfolk instead of Old Point. By his advice they applied to a person appearing to be a ticket agent or purser on board one of the steamboats of the Bay Line, which was then lying in Norfolk, to have the tickets stamped; that person examined the tickets, and signed and stamped them, and caused plaintiffs to sign their names on the back of their respective tickets; that plaintiffs left Norfolk by another route, known as the Cape Charles route, for New York, and came back from New York by the same route, and did not go to Old Point at all. Upon his return, the conductor on board the train of the defendant, after leaving Portsmouth, refused to receive the tickets of himself and wife because they were not properly stamped, and demanded the regular fare from Portsmouth to Weldon, which was paid by plaintiff.

"Plaintiffs then offered to prove that the person who signed and stamped the tickets at Norfolk was the authorized agent of the defendant. Defendant objected, and the court sustained the objection, and the plaintiffs excepted.

"The plaintiffs put in evidence the 'tickets' mentioned held by each, which were precisely similar, except as to the name of the holder. The following is a copy of the material portions of one of these tickets, and the indorsements thereon:—

"**'WILMINGTON AND WELDON RAILROAD COMPANY.**

"**'Good for one continuous first-class passage to Old Point, Virginia, and return, as per coupons attached, when officially stamped.**

"*'Subject to the following conditions:—*

"*'Having purchased this ticket at a reduced rate, I do, in consideration thereof, agree to be bound by and comply with the following conditions in respect thereto: The trip from point of sale hereof to point of destination shall be made within — days from the date of issue stamped hereon. The return trip from point of departure to point of destination shall be made within — days from date of departure, such date to be stamped on the return checks, which shall be presented to the agent at Old Point, Virginia, for that purpose, and until such date is stamped thereon such checks cannot be used. The original purchaser hereof must be identified as such by a signature to be made hereon, in the presence of and witnessed by said agent, who shall determine whether such signature is genuine by comparing the same with the signature of such purchaser hereto attached. This ticket and all checks attached shall be used in conformity with the above conditions prior to date punched in margin, and in any event shall be void on and after that date. This ticket and checks attached shall be void unless the foregoing conditions are complied with.*

"*'Signature: D. TAYLOR.*

"*'Witness: R. E. BRANCH.*

"*'T. M. EMERSON, Gen'l Passenger Agent.'*"

The court being of opinion that the plaintiffs could not recover, they suffered to a judgment of nonsuit and appealed.

The counsel for the appellee contends in the argument before us, and it may be here conceded to be so, that the "tickets" put in evidence on the trial each embodied a contract in writing between the holder thereof and the defendant. The latter

and the holder of the ticket each had a right to insist upon a strict observance of every material stipulation, provision, and requirement contained in it. Particularly for the present purpose, the defendant had the right to require that the plaintiffs should each be present in person and respectively present to its proper agent at Old Point, in Virginia, his or her ticket, and identify himself or herself as the original holder thereof by writing his or her name thereon and having the return "checks" stamped as in the check provided, which the plaintiff did not do.

But the contract being a simple contract in writing, it was competent for the defendant, at any time after it was made, and before any particular provision of it had been complied with, to waive a compliance with the same on the part of the plaintiffs by a subsequent verbal agreement,—one not in writing. It is true that a simple contract completely reduced to writing cannot be contradicted, changed, or modified by parol evidence of what was said and done by the parties to it at the time it was made, because the parties agreed to put the contract in writing and to make the writing part and evidence thereof. The very purpose of the writing is to render the agreement the more certain and to exclude parol evidence of it. Nevertheless, by the rules of the common law, it is competent for the parties to a simple contract in writing, before any breach of its provisions, either altogether to waive, dissolve, or abandon it, or to add to, change, or modify it, or vary or qualify its terms, and thus make it a new one, which must in such case be proved partly by the written and partly by the subsequent unwritten parol contract which has thus been incorporated into and made part of the original one. The reason for this seems to be that simple contracts, whether written or otherwise, are of the same dignity in contemplation of law, and therefore the written may be changed, modified, or waived in whole or in part by a subsequent one, express or implied: Smith on Contracts, *29; Chitty on Contracts, *105, and notes; Wait's Actions and Defenses, 344, 362.

The plaintiffs did not contend on the trial that the "tickets" referred to did not correctly express the contract between them respectively and the defendant as of the time they were issued, but that subsequently the defendant, through its properly authorized agent, agreed to waive, and did waive, so much of each contract "ticket," in writing, as required the plaintiffs to appear personally before the defendant's agent at Old Point,

in Virginia, and there produce the tickets, and identify themselves respectively as the original holders of them by writing each his or her name on their tickets respectively, and having the return checks attached to them stamped as required. It was competent for the defendant to waive such requirement in writing or by parol agreement, and it was likewise competent for the plaintiffs to prove such agreement of waiver by parol.

The evidence produced and received in the trial tended to prove such agreement; that the defendant's agent, or a person representing himself to be its properly authorized agent, at Norfolk, and not at Old Point, identified the plaintiffs in the proper connection, and did there what the defendant might have required to be done at Old Point to give the "tickets" effect for the return trip. The plaintiffs further "offered to prove that the person who required and stamped the tickets at Norfolk was the authorized agent of the defendant," — that is, fairly interpreting the record, — authorized to do what he purported and undertook to do.

Upon objection, the court refused to allow the plaintiffs to produce such evidence. We think it was pertinent and competent, and should have been received. As it was not, the plaintiffs are entitled to a new trial, and we so adjudge.

EXECUTORY CONTRACT IN WRITING MAY, BEFORE breach, be varied by parol: See *Bryan v. Hunt*, 4 Sneed, 543; 70 Am. Dec. 282; *Pratt v. Morrow*, 45 Mo. 404; 100 Am. Dec. 381.

McNEAL PIPE AND FOUNDRY Co. v. HOWLAND.

[99 NORTH CAROLINA, 202.]

REMOVAL OF CAUSES. — UNDER ACT OF CONGRESS, MARCH 3, 1837, AMENDATORY of that of March 3, 1875, an application by a defendant to have an action removed from the state court to the United States circuit court is properly refused, unless the action is one of which the latter court has original jurisdiction.

PROPER CASE FOR REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT HAVING BEEN MADE OUT, no formal order of removal is necessary. All that is required of the state court is simply a suspension of further proceedings, unless thereafter the cause should be remanded by the federal court for a resumption of jurisdiction.

John Hinsdale, for the plaintiff.

SMITH, C. J. The action is upon a contract entered into between the plaintiff, a corporation formed under the laws of the state of New Jersey, and the defendant A. H. Howland, a citizen and a resident of the state of Massachusetts, to recover damages for the breach thereof in the non-payment of goods sold and delivered, and is prosecuted against the other defendant, the Durham Water Company, a corporation created and acting under the laws of this state, to establish and enforce a lien therefor upon the property of the latter.

The complaint was filed at fall term, 1887, of the superior court of Durham, to which the summons was returned, and separate answers of the defendants put in, purporting to be at that term, while the verification of each was made in November, after its expiration.

The defendant Howland, alleged to owe the plaintiff for goods delivered under the contract in more than twenty thousand dollars, applied by petition (when filed does not appear, but which was passed on and denied at January term afterwards) asking for the removal of the cause to the circuit court of the United States for the western district of North Carolina, under the several acts of Congress. The plaintiff resisted the application for removal, contending that a cause for removal by the said Howland was not presented in the record, for these reasons:—

“First, because his petition and bond were not filed in apt time; secondly, because the bond did not conform to the requirements of the act of Congress, in that it was not conditioned to provide for the payment of costs in the United States court; thirdly, because the pleadings did not show a severable controversy such as was provided for in the act of Congress of 1887; fourthly, because defendant Howland being a citizen and resident of the state of Massachusetts, and not being an inhabitant of the western district of North Carolina, and the plaintiff being a citizen and resident of the state of New Jersey, and as therefore the United States circuit court would not have jurisdiction of a suit originally brought in that court, it would not have jurisdiction of this cause when removed, and on that account the motion to remove should be refused.”

The defendant offered to file an additional bond, or to amend the present one in any particular necessary.

The court, being of opinion that no order of the state court was necessary to the removal of the cause if it were a proper

case for removal, and being further of opinion that the bond was insufficient, and it had no power to allow an amendment thereto or a new bond to be filed, and that in the suit in which defendant's petition was filed there is not "a controversy which is wholly between citizens of different states," and that the circuit court of the United States would have no jurisdiction of the action, declined to make the order allowing defendant Howland to file a new bond, or to amend the bond on file, and also declined to make an order removing the action to the circuit court, from which rulings defendant Howland appealed.

The bond was in the following form:—

"Know all men by these presents: That we, A. H. Howland, as principal, and S. W. Holman, as surety, are held and firmly bound unto the McNeal Pipe and Foundry Company in the penal sum of \$250, lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, jointly and severally, firmly by these presents.

"The condition of this bond is such, that if said A. H. Howland shall enter and file, or cause to be filed, in the next circuit court of the United States for the western district of North Carolina, on the first day of its session, copies of all process, pleadings, and deposition testimony, and other proceedings in a certain suit now pending in the superior court of Durham County, state of North Carolina, in which the McNeal Pipe and Foundry Company is plaintiff, and said A. H. Howland and the Durham Water Company are defendants, and shall do such other appropriate acts as by act of Congress in that behalf are required to be done upon the removal of such suit from said state court into the said United States court, then this obligation to be void, otherwise of force.

"Dated this twenty-third day of November, 1887.

"A. H. HOWLAND. [SEAL]

"By W. W. FULLER, Attorney.

"S. W. HOLMAN." [SEAL]

The act of Congress approved on March 3, 1887, and amendatory of that of March 3, 1875, makes important changes in the law which authorizes the transfer of causes pending in a state court to the United States circuit court for trial. It confines the right to apply for and obtain a removal to non-resident defendants, the plaintiff having elected to bring his action in the jurisdiction of a state court; the sum in controversy must be more than two thousand dollars instead of five hundred dollars, the former limit, exclusive of interest

and costs; the application must be made at or before the time when, under the law or rules of the state courts, the defendant is required to answer or plead; a bond properly secured must be entered into for filing a copy of the record in the circuit court on the first day of its next sitting "and for paying all costs that may be awarded if said court shall hold that the suit was wrongfully removed," etc.

The first section of the amending statute provides, moreover, that, in order to the exercise of original jurisdiction, the action "shall be brought only in the district of either the plaintiff or defendant"; and in the recent case of the *County of Yuba v. Pioneer Gold Mining Co.*, decided in United States circuit court, northern district of California, in August last, it is held, Mr. Justice Field and the circuit and district judges concurring in the opinion, that under the second section no cause can be removed of which the circuit court would not have had original cognizance.

While it is true that the present suit is brought in a district where one of the defendants resides, who is content to let it remain, the other defendant, who seeks another jurisdiction, is a citizen and resident of another state; and if there were a several controversy between them, and it could be severed and removed, the anomalous result would follow that a cause would be there constituted which could not have originated in that court in that form.

The principle of the ruling in the case cited seems to apply to the present proposed removal; and with the sanction of such high authority agreeing with our own reading of the enactment and its general scope and policy, we must sustain the ruling of the court below.

We premit passing upon the other grounds of objection to the transfer of the cause, to wit: 1. That the application was not made at the first term of the court as of which the pleadings are filed; the want of diversity in the controversies between the plaintiff and defendants, their connection and dependence, so that presence of each in the one action is necessary to a full determination of the cause; the absence of any provision in the bond for the payment of costs,—all of which have great force, since it is sufficient to say the cause was not in law removable.

It may be observed that no order of removal was necessary, since a compliance with the prescribed conditions effected a removal, and all required of the state court was to suspend all

further proceedings, unless thereafter the case should be remanded by the circuit to the state court for a resumption of jurisdiction.

We therefore consider the appeal before us to be from the ruling of the judge to proceed in the cause: *Fitzgerald v. Allman*, 82 N. C. 492.

As to what are separable controversies, see *Ayers v. Wisnall*, 112 U. S. 187; *St. Louis R. R. Co. v. Wilson*, 114 Id. 60; *Louis. & Nash. R. R. Co. v. Ide*, 114 Id. 52; *Putnam v. Ingram*, 114 Id. 57; *St. Louis etc. R. R. Co. v. Wilson*, 114 Id. 60.

Affirmed.

REMOVAL OF CAUSES TO FEDERAL COURTS: See the extended note to *Beery v. Irick*, 12 Am. Rep. 545-552; and see *Desty's Removal of Causes*.

BURR v. MAULTSBY.

[90 NORTH CAROLINA, 263.]

LIEN GIVEN BY STATUTE TO MECHANICS AND LABORERS, NOTICE OF WHICH has been filed as prescribed by the statute, attaches to the property upon which the labor or materials were bestowed, and has relation back to the time when the work was commenced or the materials furnished; and is effectual against every other lien or encumbrance which attached subsequently, and also against purchasers for value and without notice.

E. Haywood, for the respondents.

W. F. French, D. G. Lewis, and J. B. Shelton, for the appellants.

MERRIMON, J. The parties agreed upon and submitted the following facts to the court for its judgment:—

“That the plaintiffs furnished material and performed labor in the repair of the property, lot No. 6, in the town of Whiteville. The work and labor done, and material furnished, began on the second day of September, 1884, and ended on the twentieth day of November, 1884. That a lien for the same was filed and recorded, in due form of law, on the fifth day of August, 1885, in the office of the clerk of the superior court of Columbus County.

“That on the — day of December, 1884, the defendants Maultsby and Son, who were the owners of the property against which the lien was filed, and who alone contracted for the work and material performed and furnished, conveyed said property to the defendants Kerchner and Calder Brothers,

for value, and without notice of the plaintiffs' claim, and the conveyance (or deed) was duly recorded on the second day of December, 1884; that this deed was made and delivered before the filing of the lien; that the amount of the work and the labor performed and material furnished is sixty-one dollars and eighty-six cents (\$61.86); that J. A. Maultsby and Son had no right, title, or interest whatever in the land, lot No. 6, in the town of Whiteville, when the plaintiffs' notice of lien was filed with the clerk of said court; that the lien was filed in the time required by law."

The court, upon consideration, gave judgment for the plaintiffs as follows:—

"This cause coming on to be heard upon the statement of the facts found as a special verdict, and the court being of opinion that the plaintiffs were entitled to recover, now, on motion of John D. Bellamy, Jr., attorney for the plaintiffs, it is ordered and adjudged that the plaintiffs are entitled to and have a lien on the property described in the notice of lien for the sum of \$61.86, with interest from the 17th of September, 1884, and the costs of this action. And it is hereby ordered that all the right, title, and interest of the defendants J. A. Maultsby and Son in the said land and property which said defendants had therein on the second day of September, 1884, the time of the commencement of the furnishing of the material, be sold to satisfy said debt, interest, and costs, and that the defendants be foreclosed and barred of any interest therein acquired subsequent to said date, provided the debt, interest, and costs aforesaid be not paid within thirty days."

From this judgment, the defendants, having excepted, appealed to this court.

It is not denied that the plaintiffs were entitled to a lien upon the lot of land in question, as they claim; but it is contended that inasmuch as notice of such claim of lien was not filed by them in the office of the superior court clerk of the proper county, as required by the statute (Code, secs. 1784, 1789), before the defendants purchased the land from J. A. Maultsby and Son, and they had no notice of the lien, therefore it did not attach to the land as against them, or in any way affect their title. And, for the like reason, the defendants further insist that, at the time the plaintiffs filed their notice of lien, J. A. Maultsby and Son "had no right, title, or interest whatever in the land," having before that time sold and conveyed the same to them.

So that the question we are called upon to decide is, Did the lien on the land when filed in the office of the clerk of the superior court have relation back to the time it first arose? We are of opinion that this question must be answered in the affirmative.

The first statute giving a mechanic's and laborer's lien (Acts 1868-69, c. 117, sec. 4) prescribed that the lien should be filed "at any time before or within thirty days after the performance and completion of the labor, or the final furnishing of the materials, or the gathering of the crop." This clause of the statute was interpreted by this court in *Chadbourn v. Williams*, 71 N. C. 444, and it was held that the lien in that case had relation back to the time it began to arise, and while it continued to arise, thus defeating certain mortgages that had been registered prior to the time of filing the notice of the lien, the court saying that "it must be clear that unless the claim when filed has relation back to the commencement of the furnishing the materials, the object of the act would be liable to be defeated at the pleasure of the vendee of the materials by his selling or mortgaging his estate. The act would be idle and inefficacious against the very mischief it was intended to [prevent] cause. . . . We think the notice of lien had relation back, and was prior to the claim of the defendant as to the materials furnished before the date of the mortgage."

In view of this decision, and without modifying or changing its force, the legislature enacted the statute (Acts 1876-77, c. 53, sec. 2) extending the time within which the notice of such lien might be filed to sixty days; and again, afterwards, the time was extended by statute (Acts 1881, c. 65, sec. 1) to six months; and again by the statute (Acts 1883, c. 101, sec. 1; Code, sec. 1789) to twelve months. The time was thus simply extended. It would seem, therefore, that the legislature approved of the interpretation given to the first statute cited, and intended that it should apply to those subsequently enacted. It was all along after the first enactment advertent to the subject of such liens, and frequently legislated in respect thereto, amending the first and subsequent statutes. If it had intended that such lien should have no force or effect as against purchasers and encumbrances until the filing of notice thereof, the just inference is, it would have so provided.

The statute (Code, sec. 1791) in respect to such liens pro-

vides that "upon judgment rendered in favor of the claimant, an execution for collection and enforcement thereof shall issue in the same manner as upon other judgments in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title, and interest which the owner had in the premises or the crops thereon at the time of filing the notice of the lien, before such execution shall extend to the general property of the defendant."

On the argument it was contended for the defendants that J. A. Maulsby and Son had no "right, title, and interest" to the land in question, "at the time of filing the notice of the lien," to be sold, and as the statute just recited directed such interest to be sold, this went to prove that the legislature did not intend that the lien should relate back to the time it arose.

This argument is not sound. The lien prevailed continuously next after it arose, and J. A. Maulsby and Son, who then had title to the land, could not divest themselves of it except subject to the lien. So there was "right, title, and interest" in them to be sold as contemplated by the statute.

The same statute (Code, sec. 1782) further provides that "the lien for work on crops or farms or materials given by this chapter shall be preferred to every other lien or encumbrance which attaches upon the property subsequent to the time at which the work was commenced or materials furnished."

It was contended that this clause does not embrace absolute conveyances, and hence they are unaffected by such lien, unless filed prior to their execution; and also that this provision tends to show that it was not intended that filing the laborer's notice of lien gave it efficacy as against prior purchasers. This is a mistaken view.

This clause has no such application. Its purpose is simply to prevent liens upon the property created subsequently to the laborer's lien from superseding it as to work done and materials furnished after such subsequent liens were created: *Wooten v. Hill*, 98 N. C. 48.

The purpose of the statute seems to be to favor the laborer, — to give him a security — a lien upon the property continually efficient for all purposes after it arises until discharged — for his labor and materials supplied, without any public notice of it, until the lapse of twelve months; that it shall not be

good after that time, unless it shall be filed as prescribed by the statute. If this is not so, why require notice to be filed at all? The lien extends only to the particular property affected by the labor done or materials supplied. If a sale of it by the owner operates to defeat the laborer's lien, then to file notice of it would be nugatory, — a mockery.

It is said that such liens, until notice of them filed, are snares to innocent buyers of the property to which they attach. This may be so in a measure; but the legislature had power to provide for and allow them, as it has done. It, and not the court, must be the judge of the expediency and wisdom of such legislation. It may be said, however, that the same objection applied to the registration laws of this state. until within a recent period, as to conveyances generally.

Wise registration laws promote convenience, confidence, and safety in business transactions of great importance, and encourage trade; they do not discourage the vigilant, honest dealer. In their absence, the buyer must rely upon his own scrutiny as to the title he gets.

Affirmed.

BUILDINGS AND STRUCTURES AGAINST WHICH MECHANIC LIENS MAY BE ENFORCED: See the note to *La Crosse v. Vanderpool*, 78 Am. Dec. 694-699. As to estates and interests affected by such liens, see the note to *Lyon v. McGuffey*, 45 Id. 678-680. Mechanic's lien prevails over that of a vendor: *Henderson v. Connelly*, 123 Ill. 98; 5 Am. St. Rep. 490; and relates back to the time when the work was performed or the material furnished: *Trammell v. Mount*, 68 Tex. 210; 2 Am. St. Rep. 479, and note.

TROY v. CAPE FEAR ETC. RAILROAD COMPANY.

[99 NORTH CAROLINA, 298.]

NEGLECTANCE. — WALKING ON TRACK OF RAILROAD IS NOT, IN ITSELF, such contributory negligence as will bar a recovery of damages for injuries sustained through the negligence of the company's servants.

ALTHOUGH PERSON WALKING ON TRACK OF RAILROAD COMPANY MAY BE TECHNICALLY A TRESPASSER, yet if he uses due care to avoid injury from the wrongful act of the company, he may recover damages for injuries thereby sustained.

ACTS CONSTITUTING CONTRIBUTORY NEGLIGENCE, SUCH AS WILL DEFEAT RECOVERY, must be the proximate and not the remote cause of the injury. By "proximate cause" is intended an act which directly produced, or concurred directly in producing, the injury; by "remote cause" is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened.

RAILROAD COMPANY — LICENSE TO CROSS TRACK. — When, for a series of years, the public has been in the habit of crossing the track of a railroad company, the acquiescence of the company in the public use will amount to a license, and imposes on it the duty to exercise reasonable care in the operation of its trains, so as to protect those using the license from injury.

DUTY IS ALWAYS IMPOSED ON THOSE IN CHARGE of a railway train in motion to keep a reasonable lookout, and a failure to do so will render the company liable for injuries resulting even to a trespasser who has not been guilty of contributory negligence. And although the person injured was guilty of contributory negligence, yet if the defendant might have avoided the injury by ordinary care, and did not, damages are recoverable.

GREATER CARE IS REQUIRED OF RAILROAD COMPANY than is otherwise necessary in running its trains in a populous town, and especially when a train is running out of time or at an unusual hour.

RECOVERY OF DAMAGES FOR INJURY CAUSED BY NEGLIGENCE of railroad company is restricted to actual damages.

EVIDENCE — QUESTION FOR JURY. — **WHERE EVIDENCE IS CONFLICTING AS TO CAUSE** of the injury sustained, the question should be submitted to the jury, under proper instructions from the court.

Thomas H. Sutton, for the respondent.

George M. Rose, for the appellant.

DAVIS, J. It is alleged and admitted that on or about the night of October 19, 1883, Thomas McDonald was run over while on the defendant's track in the town of Fayetteville.

The plaintiff alleges that his intestate was walking on the defendant company's track at the time of the injury at a place where "it was and for a long time had been the habit and custom of the people of the town of Fayetteville and others to pass and repass and cross the track" of defendant's road, and that while so walking on the said road he was run over by the carelessness and negligence of the defendant's servants in charge of a locomotive engine, and received injuries from which he soon thereafter died.

The defendant denies negligence, and says that the plaintiff's intestate was a trespasser, and had no right to be on defendant's track; that he was a man of dissolute habits, frequently in a state of intoxication, was in that condition on the night of the injury, and was himself guilty of gross negligence in going on defendant's track in that condition; and that he was lying down and in such a position that he could not be seen by the engineer when the accident occurred.

The following issues were submitted:—

"1. Was the death of plaintiff's intestate cause by the negligence of the defendant?

"2. Was the plaintiff's intestate guilty of contributory negligence?"

"3. What damage is the plaintiff entitled to receive?"

Many witnesses, thirty in number, were examined on the trial below, and the substance of their testimony was sent up with the case on appeal.

As there was no exception to any of the evidence by the appellant, it is unnecessary to set it out in detail, but only substantially so much of it as is necessary to a proper apprehension of the exceptions to his honor's charge.

The tendency of that on behalf of the plaintiff was to show that there is a crossing on a trestle of the defendant's road, upon which planks are placed, and that over this trestle the public have been accustomed to pass and repass for twenty or twenty-five years, using it as a common passage-way; that on the night of the 19th of October, 1883, between eight and nine o'clock, the plaintiff's intestate was crossing over the trestle, when the construction train of the defendant came into the town of Fayetteville, running slowly, not faster than three or four miles an hour, without giving any notice by sound of whistle or bell, and without any head-light; that it made so little noise some of the witnesses thought it was only a hand-car; that it sounded no alarm at the crossing, and that no whistle was blown or bell rung from Little River to Fayetteville; that the track was straight for a considerable distance, and when the intestate saw the train approaching "he tried to get across the trestle, and could not, and then tried to get off and got his foot hung"; that he "saw the damned thing coming, and tried to get out of the way, but could not"; that he made an outcry and sound of distress, which could be heard at a considerable distance, according to one witness eight hundred or nine hundred yards; that the train was going slowly, and could have been stopped within ten feet; that if the bell had been rung at the crossing, the intestate would have had ample time to have gotten off.

One witness (Smith) testified that he heard the distressing cry, got a lantern and waved it; that "if the engine had blown at the corporate limits, he would have had time to release McDonald; that he started as soon as he heard the outcry"; that the engineer was incompetent, "blind in one eye, and could not see well out of the other"; that the intestate was an industrious man and a skilled laborer, worth one dollar per day; that he sometimes drank, but was not a drunkard;

that he was sober at the time of the accident; that he was fifty-five or sixty years of age, and in good health.

On behalf of the defendant, the evidence tended to show that the planks on the trestle were put there by defendant, not for public use, but for the employees of the road, when engaged about its business; that the defendant owned the property, and there was a notice at the gate, "No admittance except on business"; that McDonald was inside the gate and was drunk on the occasion of the accident; that he was in the habit of going on the track intoxicated, and had been warned not to do so; that he was lying down; that if he had been standing up he could have been seen; that he himself said that "if he had not been drinking he would not have been caught there"; that he was drunk the evening of the accident, so much so that he "could hardly keep his feet"; that Wright was a competent engineer, and had always been trusted.

Wright, the engineer, testified that the head-light was burning; that he did not know whether the bell was rung or not; that "if a man had been standing up he could have seen him three hundred yards; saw no man." He afterwards said that the "bell rung at the crossing; heard cry about one hundred feet off,—cry of distress."

The court charged the jury that, as to the first issue, if the accident was caused by negligence of defendant, the jury should answer yes, otherwise no, and that the burden was on plaintiff to show negligence; that if train was moving three or four miles an hour, defendant not being at a crossing, it was not negligence not to ring the bell or blow the whistle, unless such failure is shown to have contributed to the injury. It would have been negligence if there had been no head-light, since, by the uncontradicted evidence, the track was straight for half a mile; but if there was a head-light, it was sufficient warning to deceased, and there could have been no negligence in failing to ring bell or blow whistle; that if the agent or engineer of company had notice from the outcry or otherwise that a human being was fastened on the track, it was negligence not to stop his train, if he had time to do so after receiving such notice, that is, if he received the notice at all.

As to the second issue, the court charged the failure of the engineer to sound whistle or ring bell, if such were the fact, did not relieve deceased from necessity of taking ordinary precautions for his safety. Negligence of company's em-

ployees in that particular was no excuse for his negligence. He was bound to look and listen before attempting to cross the trestle in order to avoid an approaching train, and not to walk carelessly into a place of danger. Had he used his senses, he might have heard or seen the coming train. If he omitted to do so, and walked thoughtlessly and carelessly on the track, he was guilty of culpable negligence, and contributed to his own injury. If he did use his senses, saw the train coming, or heard it, and yet undertook to cross the trestle instead of waiting for the train to pass, and was injured, the consequences of the mistake cannot be cast on the defendant. No railroad company can be held for a failure of experiments of that kind. But, notwithstanding the previous negligence of deceased (if the jury so find), if, at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on part of defendant, the defendant is liable, and the jury would find second issue in favor of plaintiff: *Davis v. Mann*, as cited in *Gunter v. Wilkes*, 85 N. C. 312.

Plaintiff requested court to charge:—

“1. If the railroad company had by long consent allowed the public to pass and re-pass the trestle-work, then he was not a trespasser.” This was given.

“2. That if the engineer in charge was incompetent, or if, from the circumstances of the case, the servant of the defendant (the engineer) exhibited a careless or reckless disregard of life or limb, the defendants are liable in damages.” This was given.

“3. That in coming into a populous town (as is admitted in the pleadings) more care is necessary than otherwise; especially is this so when an engine is coming out of time or at an unusual hour.” This was given.

“4. That if the deceased was guilty of contributory negligence, and the jury believe that if ordinary care had been used or the accident might have been avoided, then, though they believe the deceased contributed to the accident, the railroad is liable.” The court gave, instead of this, the words of *Davis v. Mann*, as quoted in *Gunter v. Wilkes*, 85 N. C. 312.

“5. That what the damages are is to be fixed by the jury, under all the circumstances of the case, the same being left largely to the common sense and discretion.” This was given, the court explaining, however, it must be restricted to actual

damages, i. e., the money loss, calculating the annual net earnings and expectancy of life, etc.

"6. If the engineer was without head-light, and did not ring the bell or blow the whistle coming into town, this of itself is evidence of negligence on the part of the railroad company, especially where human life is the forfeit of his failure to use the above ordinary care." This was given, the court adding that it would be a circumstance, if true, to be weighed in connection with all the evidence in the case.

The defendant asked the court to charge as follows:—

"1. If the jury believe that Thomas McDonald was run over by engine of defendant at a place not a public crossing, but on private property of defendant, company would not be responsible unless engineer knew of deceased's dangerous position on the track, 'or with reasonable care and diligence might have known it.'" This the court gave, adding the words in quotation marks.

"4. If deceased, in attempting to get off track, caught his foot, and was unable to get off, and was lying in such a position that he could not be seen by engineer, his accident was the result of his own recklessness, and company is not responsible, 'unless there was such outcry that the engineer, with reasonable care, could have prevented the accident.'" This the court gave, adding the words in quotation marks.

"5. If the jury believe the statement made by deceased to plaintiff's witness, to wit: 'I saw the damned thing coming, and tried to get out of the way, but could n't,' and 'I saw the engine coming; thought I had time to cross the trestle; found I had not; tried to get off, and got my foot hung,'—his conduct, as thus stated, was contributory negligence. 'This subject, however, to the condition that the defendant, with reasonable care and prudence, could not have avoided consequence of deceased's negligence.'" Given after adding words in quotation marks.

"6. If the jury believe the evidence introduced by plaintiff, and the uncontradicted evidence offered by defendant, they will find that deceased was guilty of contributory negligence." This was not given, except as far as embraced in other charges given.

To the first issue the jury answered "Yes," to the second "No," and to the third "Two thousand dollars."

Judgment and appeal by defendant.

The charge of the court was given with care, and we think

stated the law fully and fairly as applicable to every view presented by the evidence. We have given it as sent up with the case on appeal; but only two exceptions—one to the first instruction asked for by the plaintiff, which was given, and the other to the sixth instruction asked for by the defendant, which was refused—were insisted upon in this court, and as the other exceptions were not pressed, we dispose of them by saying that they were of no avail.

1. The defendant says that the plaintiff's intestate was a "trespasser," and being wrongfully on the defendant's road, the injury was the result of his own wrong. For this position many authorities are cited, and especially *Bacon v. Baltimore etc. R. R. Co.*, 15 Am. & Eng. R. R. Cas. 409, and the note, in which many cases are cited to the effect that persons walking on the track of a railroad are trespassers, and generally considered to be guilty of such contributory negligence as to bar a recovery of damages for injuries sustained while so trespassing. We think that upon a careful examination of the cases cited by counsel for the appellant it will be found that in most of them the injury was the result of contributory negligence of the party injured proximately causing it, and not resulting directly from the negligence of the defendant, and where they have gone beyond this, they are not in accord with the rulings of this court, nor in harmony with the current of authority.

In *Byrne v. New York Central and Hudson R. R. Co.*, 104 N. Y. 362, 58 Am. Rep. 512, it was said "that when the public, for a series of years, had been in the habit of crossing the railroad, the acquiescence of the defendant in the public use amounted to a license or permission to cross at the point, and imposed the duty upon it, as to all persons so crossing, to exercise reasonable care in the movement of its trains, so as to protect them from injury," and this position is supported by abundant authority.

But even if he were a trespasser, we do not assent to the idea that the company is thereby released from reasonable care.

In *Vicksburg and Meridian R. R. Co. v. McGowan*, 62 Miss. 682, Campbell, G. J., says: "One may be technically a trespasser, and if he uses due care to avoid injury from the wrongful act of another, he may recover; and he may not be a trespasser, and yet guilty of such contributory negligence as to preclude him from recovering."

He says: "The criterion is, whether he observes due care,

under the circumstances of his situation, whatever it may be, to avoid harm from the act complained of.

To constitute such contributory negligence as will defeat a recovery, it must be the proximate and not the remote cause of the injury. In *Baltimore etc. R. R. Co. v. Trainer*, 33 Md. 542, it is said: "By 'proximate cause' is intended an act which directly produced, or concurred directly in producing, the injury. By 'remote cause' is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened. No man would ever have been killed on a railway if he had never gone on or near the track. But if a man does imprudently and incautiously go on a railroad track, and is killed or injured by a train of cars, the company is responsible, unless it has used reasonable care and caution to avert it, provided the circumstances were not such, when the party went on the track, as to threaten direct injury, and provided that, being on the track, he did nothing, positive or negative, to contribute to the immediate injury."

In *H. & T. C. R. R. Co. v. Symkins*, 54 Tex. 615, it is said "that a reasonable lookout, varying according to the danger and surrounding circumstances, is a duty always devolving on those in charge of a railway train in motion, and railway companies are bound to exercise due care to avoid injury to others; and a failure to do so will render them liable for injuries resulting even to a trespasser who has not been guilty of contributory negligence."

In *Parker v. Railroad*, 86 N. C. 221, relied on by defendant, the deceased could, by using ordinary care, have avoided the injury, and the defendant could not stop the engine in time to prevent it.

We conclude that there was no error in giving the instruction complained of.

2. The second exception relied on here was to the refusal to give the sixth instruction asked for by the defendant. This instruction "was not given except as far as embraced in other charges given."

There was evidence tending to show that the negligence of the defendant was the direct and proximate cause of the injury; and there was evidence tending to show that the deceased, being on the track under the circumstances detailed in evidence (which was not *per se* such contributory negligence

as relieved the defendant from liability for failure to use ordinary care), could not avoid the injury.

These questions were left fairly to the jury, and we can see no error in the instructions of the court excepted to, or in refusing those asked or denied.

There is no error.

WALKING ON TRACK OF RAILROAD IS NOT, OF ITSELF, SUCH CONTRIBUTORY NEGLIGENCE as will bar a recovery for injuries sustained through the company's negligence; *Louisville R. R. Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155, and note; *Ohio etc. R'y Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638.

CONTRIBUTORY NEGLIGENCE, TO BAR RECOVERY, MUST BE PROXIMATE CAUSE OF INJURY: See *Hurt v. St. Louis etc. R'y Co.*, 94 Mo. 255; 4 Am. St. Rep. 374. As to what is proximate cause of injury, see *West Mahanoy T. Co. v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604.

RAILROAD COMPANY IS BOUND TO EXERCISE DUE CARE to persons at public crossings, and to that end should keep a reasonable lookout, and give proper warning of approach of trains: *Chicago etc. R. R. Co. v. Dillon*, 123 Ill. 570; 5 Am. St. Rep. 559; and greater care is required at crossings in populous cities than elsewhere: *Bolinger v. St. Paul etc. R. R. Co.*, 36 Minn. 418; 1 Am. St. Rep. 680.

WHEN EVIDENCE IS CONFLICTING, NEGLIGENCE IS QUESTION OF FACT: See *Indianapolis etc. R'y Co. v. Watson*, 114 Ind. 20; 5 Am. St. Rep. 578, and note.

CLEMMONS v. FIELD.

[99 NORTH CAROLINA, 400.]

JUDGMENTS, VACATION OF. — POWER CONFERRED UPON JUDGE BY STATUTE (N. C. Code, sec. 274) to vacate and set aside a judgment and relieve a party therefrom, when taken against him through his mistake, inadvertence, surprise, or excusable neglect, does not extend to a judgment which necessarily follows the verdict. In the latter case, relief is obtainable on motion for a new trial made at the term when the judgment was rendered; but it is discretionary with the judge even then to allow or refuse the relief, and his action in refusing it, except for a supposed want of power, is not reviewable on appeal.

C. A. Moore, for the plaintiff.

M. E. Carter and W. R. Whitson, for the defendant.

SMITH, C. J. This was a motion made by the defendant after notice at March term, 1888, of Buncombe superior court, to set aside a judgment rendered at the term preceding, for excusable neglect under section 274 of the code, heard and denied upon the following facts, found by MacRae, J.:—

"The action was placed upon the calendar for trial on a day certain, or as soon thereafter as it could be reached.

"Several days previous to that for which this case was set upon the calendar, defendant wrote to his attorney in Asheville to wire him as soon as there was any possibility of the case being reached.

"Defendant's attorney, believing that the case would not be reached at all, failed to respond by telegraph to defendant's letter, and defendant did not attend that term of the court.

"The case was tried by a jury on the last day for the trial of jury cases, in the afternoon. On the morning of the same day, or on the afternoon of the day before the trial, defendant's counsel asked the presiding judge what disposition had been made of the trial docket; the judge replied 'that the whole of it had been continued except two little cases to be tried by consent.' Counsel for defendant gave the matter no further attention until he was sent for and notified that the case was called for trial, whereupon he went into court and moved for a continuance, which the presiding judge, after hearing counsel, declined to grant. And the case was tried by a jury.

"Defendant has a meritorious defense, if true. On the foregoing facts found, I think that defendant's negligence was inexcusable; it was his duty to be present at the court on the day set for the trial upon the calendar, and if the case was not reached on that day, to wait its call, or act as advised.

"This case having been tried by a jury, the defendant is not entitled to relief under section 274 of the code. His remedy was by appeal. The motion is denied." Defendant appealed.

Under the former practice, a final judgment rendered in a proceeding at law was beyond the control of the court after the expiration of the term: *Moore v. Hinnant*, 90 N. C. 163; and the rule is now established by law which declares that no motion "to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages," shall be heard, except at the term when the trial takes place: Code, sec. 412, par. 4; *England v. Duckworth*, 75 N. C. 309. But the power to vacate and set aside a judgment and relieve a party therefrom, when "taken against him through his mistake, inadvertence, surprise, or excusable neglect," within one year after notice, is expressly conferred by law: Code, sec. 274; and thus far, under the conditions mentioned,

only authority over its rulings is prolonged for the specified period. There is no obligation to exercise it even when the application comes within the terms of the statute, though some of the earlier decisions look that way; but it is discretionary with the judge even then to allow or refuse the relief, and his action in refusing the relief, except for a supposed want of power, is not reviewable on appeal: *Austin v. Clarks*, 70 N. C. 458.

In *Beck v. Bellamy*, 93 N. C. 129, a similar effort was made, after a verdict and judgment rendered at a former term, to obtain relief, as is proposed in this case, under the same provision of the code, and this court said: "The statute, in conferring power, confines its exercise to judgments rendered under the specified conditions, and does not embrace such as necessarily follow the verdict, and the setting aside of which, without at the same time disturbing the verdict, would be of no advantage to the party, for it must again be entered in conformity to the jury findings. To vacate both is necessary to afford the desired relief, and this would be to grant a new trial, which can only be done at the term when it took place." To the same effect are the cases of *Foley v. Blank*, 92 Id. 476; *Winborne v. Johnson*, 95 Id. 46; and *Twitty v. Logan*, 86 Id. 712.

If, however, the judge refuses to grant the motion for a supposed want of power, when, upon a proper construction of the statute, he has it, the error may be corrected on appeal, and an opportunity afforded him to determine whether he will exercise it: *Hudgins v. White*, 65 N. C. 398; *Gilchrist v. Kitchen*, 86 Id. 20. So a refusal to amend for want of power to allow the amendment asked in the case when it is possessed, this is error in law, and can be corrected in the appellate court. *Henderson v. Graham*, 84 Id. 496, citing *Freeman v. Morris*, Busb. 287, where a motion for permission to supply, in the record, a copy of a lost will which had been sustained by the verdict of the jury was refused, upon the ground of a supposed absence of power to allow it, and the error was corrected on appeal, and the application remitted for the exercise of the judge's discretion.

These cases all stand upon the ground that the refusal to act proceeded from an alleged want of power, and in this consisted an error in law.

The wrong complained of by the defendant in this case consists in being forced into a trial unexpectedly and unprepared,

when this was in consequence of what was said to his counsel by the judge himself about the cause being continued; or in other words, not allowing a continuance, under the circumstances, to another term. However forcible was this application, it could only be made to the judge who tried the cause, and not to the judge who presided at the succeeding term; and we cannot see how these considerations can enter into and qualify a judgment of necessity following the verdict as one obtained "through his [the defendant's] mistake, inadvertence, surprise, or excusable neglect," and come within the operative provisions of the law.

It is true, the judge holds the defendant's negligence in reference to being unprepared for the trial to be inexcusable, and the inference may possibly be thence drawn that he deemed himself not, however, invested with power to act in the premises; the record does not so state, nor is there any intimation as to what he would do if possessed of the necessary authority; and to be a reviewable case, the refusal should affirmatively appear to have proceeded from the adjudged want of it. As we interpret the case, the judge simply ruled irrespective of the question of power; even if he possessed it, it would not be exercised in favor of the defendant on the facts shown in evidence.

If the record be construed as denying the motion because of the absence of authority to allow it, it does not follow that this was based upon a construction of the statute, whether erroneous or not; but it should more reasonably be ascribed to the ruling in *Beck v. Bellamy, supra*, that the case was not within the statute. However this may be, the act of refusal cannot be assigned for error, unless it results from an erroneous ruling. So that he has not exercised a discretion committed to him, and this the case must show.

There is no error, and the judgment is affirmed.

WHERE TRIAL HAS BEEN HAD AT WHICH PARTIES WERE DULY REPRESENTED, they can obtain relief from judgment only by means provided by law in reference to new trials: Freeman on Judgments, sec. 106.

COWARD v. CHASTAIN.

[99 NORTH CAROLINA, 442.]

INJUNCTION. — WHERE PARTY HAS OBTAINED TEMPORARY RESTRAINING ORDER, AND DOES NOT APPEAR and ask for its continuance at the time and place fixed by consent for the hearing, it is not error for the judge to vacate it, — no cause being shown for continuing it in force.

ISSUE OF EXECUTION UPON JUDGMENT BARRED by lapse of time would confer no right to sell; and the sale, if made, would be ineffectual to pass title.

INJUNCTION IS NOT PROPER REMEDY OF PARTY TO JUDGMENT AGAINST the enforcement thereof, but the redress is by a direct interposition in the cause, recalling or modifying the process, and meanwhile issuing a *superseas* to the officer in possession of it.

E. R. Stamps, for the respondent.

E. C. Smith, for the appellants.

SMITH, C. J. The defendants obtained from the judge holding the courts of the district of which Jackson County forms a part, on the twenty-fifth day of August, 1887, at chambers, in Asheville, an order restraining the plaintiff from proceeding under an execution sued out and in the hands of the sheriff of that county, and appointing Monday, September 12th, as the time, and Waynesville as the place, when he would allow the plaintiff to show cause why the order should not be continued. This was upon an allegation of the defendants, duly verified, that the writ, while falsely professing to have been issued upon a judgment rendered at spring term, 1885, was in fact issued upon a judgment of November term, 1874, which was barred by the statute of limitations. The hearing being continued, by consent, from the time and place designated until Monday, the 26th of the same month, and then to be had at Webster, in the county of Jackson, and the defendants being present neither in person nor by counsel at the time and place last named, and no cause being shown for the continuing the restraining order in force, and more than twenty days having expired since it was made, the judge vacated the restraining order, and left the plaintiff free to pursue his remedy by execution, but reserved the application for an injunction, to be heard upon affidavits on October 11th, at Hayesville, in Clay County. From this judgment the defendants were allowed to appeal, alleging error in so much of it as allows the plaintiff to proceed with his execution.

From the copy of the judgment sent up in the case on appeal, it appears to have been rendered at the October term,

1872, of the superior court of Clay County; and had this evidence been before the judge, as it seems not to have been, and the defendants had asked for an injunction, it would doubtless have been granted, since a sale under such a judgment, unrenewed, would be inoperative to pass the title, as declared in *Lyon v. Russ*, 84 N. C. 588; *Lytle v. Lytle*, 94 Id. 683.

This is, of course, upon the assumption that the vitality of the judgment has not been preserved by a continued issue of executions, under section 440 of the code.

If the judgment be not only dormant, but barred by the lapse of time, and this the execution, if truly speaking the time of the rendering of the judgment, would show upon its face, its issue would confer no right to sell, and the sale, if made, would be ineffectual to pass title. In such case, no harm could come from the refusal to grant the order of injunction.

But however this may be, as it was not asked, nor any reason shown why a restraining order should be made, it was not error to refuse, or rather to fail, to make it when not demanded.

We again call attention to the irregularity in the mode of proceeding adopted, in that, while the right to process to enforce the judgment by appropriate remedies remains unimpaired, its exercise is restrained. This, of necessity, was the proper course of procedure under the former divided jurisdictions, in which a court of equity, without a direct interference with the action of a court of law, exercised authority over the person of the suitor, and restrained his oppressive and wrongful use of a legal right. No interference in a separate suit was permissible in a pending suit between the parties in a court of equity, and now, when there is but one tribunal, the redress is by a direct interposition recalling and modifying the process in a proper case, and meanwhile issuing a *superseas* order to the officer in possession of it: *Chambers v. Penland*, 78 N. C. 53; *Parker v. Bledsoe*, 87 Id. 221. There is no error, and the judgment is affirmed.

EXECUTION ISSUED UPON JUDGMENT BARRED BY LAPSE OF TIME IS VOID: Freeman on Executions, 2d ed., sec. 27 a, p. 57, 58; and a sale under a void execution passes no title, even to a *bona fide* purchaser: *Hunt v. Loucks*, 33 Cal. 372; 99 Am. Dec. 404.

MOST EFFECTUAL MODE OF PREVENTING ABUSE OF PROCESS BY USING IT TO ENFORCE VOID JUDGMENT is by extirpating the judgment itself: See *Peoples v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448, and note.

CARPENTER v. MEDFORD.

[99 NORTH CAROLINA, 495.]

STATUTE OF FRAUDS.—TREES GROWING ON LAND SO FAR PARTAKE OF REALTY that any contract for their sale is within the statute of frauds; yet if the contract is in contemplation of their severance from the land, whereby they become personalty, the same rule in respect to the identification of personal property is applicable.

SALE OF PART OF LARGER NUMBER OF ARTICLES OF PERSONAL PROPERTY, NOT DISTINGUISHABLE upon the face of the contract, will be operative to pass title, if, at the time, they are separated and understood by the parties.

SALE OF GROWING TREES—PAROL EVIDENCE.—Where, by a contract of sale in writing, duly proved and registered, the vendor sold "nine walnut trees on my premises, on the waters of Pigeon River, Haywood County (township No. 4), North Carolina," the trees at the time being selected, measured, priced, and marked, but not identified in the contract, parol evidence is admissible to identify them, and if identified, the title would pass under the contract.

R. D. Gülmer and W. L. Norwood, for the appellants.

W. W. Jones, for the respondents.

SMITH, C. J. One W. L. Massey, being the owner of the tract of land whereof the boundaries are given in the complaint, as well as its location in Haywood County, entered into the following contract:—

"Received of Carpenter, Rhodes, & Co., by J. F. Waddell, forty-five dollars for nine walnut trees on my premises, on the waters of Pigeon River, Haywood County (township No. 4), North Carolina. I hereby give the said Carpenter, Rhodes, & Co. permission to haul the logs through my premises when they want to move them. This twenty-seventh day of August, 1881.

"W. L. MASSEY. [SEAL]

"Privilege to deaden said timber if I want to clear said ground."

The instrument was duly proved and registered on the twenty-first day of December of the same year. On January 2, 1882, the land on which the trees were standing was sold, and by deed executed by Massey and wife, conveyed to the defendant Lebo Medford, without reservation, and their deed, after being proved, was registered on December 31, 1885.

The firm of Carpenter, Rhodes, & Co. consisted of J. E. R. Carpenter and W. J. Embry, who bring the action in their own names against the defendants for cutting the trees claimed by them under the contract of sale of the said Massey to them.

There was evidence of the cutting down and removal of several of the walnut trees by the defendant John Terrell, acting under the authority of the defendant Medford, who undertook to dispose of them to the other.

The testimony of the witnesses offered by the plaintiffs was to this effect:—

W. L. Massey swore that before executing the writing of August 27, 1881, himself and J. F. Waddell, agent of the purchasers, went on the land, and he selected, measured, priced, and marked the trees, making a cross-mark with his knife upon each; that they then went to the house, where the agent paid the price agreed on for the trees, nine of which only could be found after search of the required dimensions, to wit, of a circumference of not less than six feet; that when the land was sold to Medford, witness communicated to him the fact of the sale of the nine trees marked and branded, and pointed out two of them; that some of the removed trees bore a cross-mark, and were those selected and marked by himself and Waddell.

There was other testimony in corroboration, and again, in opposition to the statement, that any of the trees removed and converted to defendants' use bore marks of identification; and the defendant Terrell swore that they had no knowledge of the previous sale to plaintiffs, or to any other person.

The plaintiffs' counsel asked an instruction, in writing, to the effect that "if, at the time of making sale to the plaintiffs, the trees referred to in the contract were selected and branded or marked, and the contract registered, and thereafter the defendants converted all or some of them, the plaintiffs would be entitled to recover," meaning, as we suppose, to have an affirmative issue as to the title to so many. This was refused, and the jury charged as follows:—

"Trees growing on land are a part of the land, and are so much a part of the land that any contract to convey them must be in writing, signed by the party to be charged therewith, or by some one authorized by the party to be charged. The written contract to convey land, or trees growing on land, must be sufficiently definite to point out the particular trees intended to be conveyed. The description is sufficiently definite if it can be fitted to the particular trees by parol evidence. Now, in this case, the description in the alleged contract set out in the plaintiffs' complaint is such a description that may possibly be fitted by parol evidence. If Massey owned but one

premises in Haywood County, on Pigeon River, in township No. 4, and there was, at the time of the contract, growing or standing on that premises nine walnut trees, and only nine walnut trees, then the description would be fitted to the description in the contract; and if such contract was duly proven, it would pass the title to the nine walnut trees. But if there were more than nine walnut trees on the premises of Massey, in Haywood County, on Pigeon River, in township No. 4, then the description could not be fitted to any particular nine trees out of a greater number, and the contract would be void for uncertainty. And this would be so, although before the contract was written certain trees had been marked, for the contract does not describe the walnut trees as marked trees, and parol evidence cannot be heard to add to or vary the written agreement. The words used in contracts are usually to be taken in their ordinary signification, unless the words are used in a technical sense. The words 'walnut trees' are used, and the jury are to judge from the evidence in what sense or signification they are used in this contract. If the evidence satisfies you that the words 'walnut trees' were intended by both the parties to the contract to mean walnut trees of a particular size or kind, then, if there were only nine walnut trees of the kind described in the contract, the description would be sufficient; but if there were more than nine walnut trees of the kind described in the contract, then the description cannot be fitted to any particular nine out of a greater number."

Plaintiffs excepted to the foregoing charge. Verdict and judgment for defendants. Appeal by plaintiffs.

The controversy is thus narrowed to a single proposition, involving the competency of the evidence to identify the trees as the subject-matter of the contract and give it efficiency as an instrument conveying title to the plaintiffs. It was in form and effect a deed, with all the requirements necessary in passing title, and if the imperfect designation of the trees, upon which it is to operate, can be aided by parol proof, they are ascertained.

Although so partaking of the realty as to come under the statute of frauds, as held in *Mizell v. Burnett*, 4 Jones, 249, and other cases, the contract is in contemplation of a severance of the trees from the land, whereby they would become personalty, and the same rule in respect to certainty of description be applicable.

It is very clear that the selection and marking of the trees accompanying the sale separates and distinguishes the subject-matter of the contract from all other trees of the same kind upon the premises so as to transfer the property therein.

In *Dunkart v. Rinehear*, 89 N. C. 354, it was decided that "any of my black-walnut trees, not exceeding fifteen in number, that will girth eight feet six inches in circumference, and under ten feet," there being less than that number on the land, was a sufficient description, with the aid of parol evidence, while it would have been otherwise if there had been more such trees of the required size.

The cases cited in the brief of appellants' counsel, and other references, sustain the general proposition that a sale of part of a larger number of articles of personal property, not distinguishable upon the face of the contract, will be operative to pass title, if, at the time, they are separated and understood by the parties: *Goff v. Pope*, 83 N. C. 123; *Harris v. Woodard*, 96 Id. 232; 1 Greenl. Ev., secs. 287, 288. The author last mentioned lays down the general doctrine in these words: "If the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, etc., parol evidence is admissible of any extrinsic circumstances tending to show what person or persons or what things were intended by the party, or to ascertain his meaning in any other respect," etc. The language is, of course, not intended to apply to an indefinite description that fits no property, but where its uncertainty arises from the fact that it fits more than one article of property, and there it is admitted to show which was meant: *Richards v. Schlegelmich*, 65 N. C. 150. But the ruling in *Blakeley v. Patrick*, 67 Id. 40, followed in *Spivey v. Grant*, 96 Id. 214, is directly and decisively in point. The deed in trust in this case purported to convey ten new buggies out of a larger number on hand, and upon the question of title, Pearson, C. J., near the close of the opinion, sums up thus: "To vest the title or ownership in any particular buggies, it was necessary to set them apart, so as to make a constructive delivery and effect an executed contract; in the absence of such identification, the agreement, as we have seen, was executory only." Now, the trees were designated, after examination, by marks of identification, the only way in which it could be done.

There is error in the ruling, and the judgment is reversed, in order to a new trial.

SALE OF GROWING TREES IN CONTRACT WITHIN STATUTE OF FRAUDS, WHEN: See the notes to *Kingsley v. Holbrook*, 86 Am. Dec. 182, 183; *Parker v. Piercy*, 17 Am. Rep. 598-601.

SELECTION AND MARKING OF TREES SOLD IS A CONSTRUCTIVE DELIVERY, and passes title: See *Byrness v. Reese*, 4 Met. 372; 83 Am. Dec. 481.

MARSHALL FOUNDRY COMPANY v. KILLIAN.

[99 NORTH CAROLINA, 501.]

CORPORATIONS.—WHEN CORPORATION IS FORMED UNDER AUTHORITY OF STATE, CAPITAL SUBSCRIBED BECOMES BASIS OF CREDIT, and the members of the corporation are not individually liable for its debts, except and only to the extent that the charter or letters of incorporation may make them so.

CAPITAL STOCK OF CORPORATION, INCLUDING UNPAID SUBSCRIPTIONS THEREON, CONSTITUTES a trust fund for the benefit of the creditors of the corporation, and the creditors have a right to examine into the action of the corporation to see if the subscriptions have been paid, and how.

EACH SUBSCRIBER FOR STOCK IN CORPORATION BECOMES LIABLE FOR THE AMOUNT of stock subscribed by him, and he can only discharge this liability by paying it, in money or money's worth, in the manner indicated by the subscription and the charter and by-laws of the corporation. Parol evidence is not admissible to vary the terms of subscription, or to show a discharge from liability in any way other than that required by the terms of subscription and the charter and by-laws.

PERSONS WHO SUBSCRIBE TO STOCK AND PARTICIPATE IN IRREGULAR FORMATION OF CORPORATION UNDER GUISE of the authority conferred by statute constitute a corporation *de facto*, if not *de jure*; and having held out inducements to the public to deal with and credit it upon the faith of its chartered capital, they are liable at least to the extent of the capital stock subscribed by them, and cannot evade that liability by any secret arrangement entered into among themselves.

ONE WHO PARTICIPATES IN ORGANIZING SUCH CORPORATION, AND WHO ACTS AS ITS PRESIDENT, WAIVES all objection to the validity of its constitution or organization, and as to him the provisions of its charter and by-laws are binding.

L. L. Witherspoon, for the appellant.

DAVIS, J. Civil action, originally commenced before a justice of the peace for Catawba County, to recover the sum of two hundred dollars, alleged to be due by subscription to the Marshall Foundry Company, and carried by appeal to the superior court of said county, and tried before Boykin, J., at January term, 1888.

It was in evidence that A. W. Marshall, W. R. Self, and others, by articles of agreement under the statute, were incorporated before the clerk on the seventh day of February, 1884,

under the corporate name of the "Marshall Foundry Company."

It was admitted that J. F. Murrill had been duly appointed receiver to take charge of the property of the company, and collect debts due it, in a certain proceeding, instituted among other purposes, to set aside a mortgage executed by the company to secure a debt due one Alexander, wherein fraud was alleged, etc.

The defendant became an incorporator on the eleventh day of February, 1884, in the following manner: The above-named W. R. Self, one of the original incorporators, had subscribed for twenty shares, of the value of one hundred dollars each, and had paid in cash for fourteen of them.

He had sold two of the shares to one Miller, who paid him cash therefor. Miller sold the two shares to the defendant, Killian, who paid him the cash therefor. Upon the organization of the company, the defendant was elected its president, and issued certificates of stock to all the then subscribers, himself among the number, all of which were duly countersigned by the secretary and treasurer in the manner prescribed by the rules and regulations. The certificate of two hundred dollars issued to himself represented the two hundred dollars of the fourteen hundred dollars subscription of Self, and by him transferred to Miller, and by the latter to defendant, and is the debt sued on in this action.

No certificate had been issued up to the date of the election of the defendant president of the company. Prior to the issuing of the stock, the company was notified of his purchase by the defendant, and it was admitted that Self had paid the subscription price of fourteen shares, in which are included the two shares of defendant. It was in evidence that the said company had duly accepted and ratified the defendant's purchase of stock, and had permitted him to become a member and enjoy the benefits thereof.

The defendant had agreed to subscribe two hundred dollars to the capital stock when the company was established, and was permitted to substitute these two shares, represented by said certificate, in lieu thereof, when organization was perfected.

It does not appear that defendant's subscription has been marked satisfied on the books, but it does appear that the certificate was issued as aforesaid.

The plaintiff objected to the evidence showing the manner

in which the defendant sought to relieve himself of liability to the plaintiff, because oral evidence could not be introduced to contradict the articles of subscription, and the stock could only be paid for in cash to the company, and because it did not appear that the company had authorized such substitution of stock, and because such would be a fraud on the creditors. Overruled, and plaintiff excepted.

The subscription list and by-laws were put in evidence, and from the former it appears that the defendant subscribed for two shares (one hundred dollars each), and from the latter, among other provisions, that the stock shall be paid for in cash, "unless such payment shall be otherwise provided for by special contract with the company."

There is also a requirement that "all transfers of stock shall be made upon the books of the company, duly attested by the secretary and treasurer."

The plaintiff proposed to prove that the company was now greatly indebted, and was insolvent. Objected to by the defendant. Objection sustained, and exception by plaintiff.

The court instructed the jury that the plaintiff could not recover if they believed the evidence. The plaintiff excepted. Verdict and judgment for defendant. Appeal by plaintiff.

This action was commenced before a justice of the peace, and the allegations of fraud, or other grounds upon which the plaintiff Murrill was appointed receiver, do not distinctly appear, but it appears to have been done at the instance of a creditor, and we assume that it was done under the provision of section 668 of the code, authorizing the appointment of receivers for the causes there stated.

By the "articles of agreement" filed with the clerk, under which "letters declaring" the incorporation were issued, it is stated: "The capital stock of the incorporation shall be ten thousand dollars, divided into one hundred shares of one hundred dollars each"; but in fact, as appears from the subscription list, only seventy shares (seven thousand dollars) were subscribed, and in other respects the provisions of the statute seem not to have been complied with in the formation of the corporation; but of this the defendant, who became the president of the company upon its organization under the charter, can take no advantage, for the company was organized, and by participating in the organization, and acting as its president, all objection to the validity of its constitution or organization was waived, and as to him the provisions of the charter

and by-laws of the company were binding: Cook on Stock and Stockholders, secs. 181, 233.

When a number of persons associate themselves together for the purpose of carrying on any business, a partnership is constituted, by which each member becomes liable to any person who may give it credit, and the creditor has a right to be paid, if any one of the firm is able to pay; but when a corporation is formed under the authority of the state, the capital subscribed becomes the basis of credit, and the members of the company are not individually liable for its debts, except and only to the extent that the charter or letters of incorporation may make them so.

It is said in Cook on Stock and Stockholders, section 199: "The capital or capital stock of a corporation is the aggregate of the par value of all the shares into which the capital is divided upon the incorporation; it is the fund or resource with which the corporation is enabled to act and transact its business, and upon the faith of which persons give credit to the corporation, and become corporate creditors. The public in dealing with a corporation has the right to assume that its actual capital, in money or money's worth, is equal to the capital stock which it purports to have, unless it has been impaired by business losses. The public has a right also to assume that the capital stock has been or will be fully paid up if it be necessary, in order to meet corporate liabilities. Accordingly, the American courts go very far to protect corporate creditors; and in this country it is a well-settled doctrine that capital stock, and especially unpaid subscriptions to the capital stock, constitute a trust fund for the benefit of the creditors of the corporation." He then enumerates some of the methods by which stockholders seek to avoid their liability to corporate creditors, one of which is "by a transfer of the stock," another is by "a cancellation or withdrawal from the contract," and another by "a release from the obligation to pay the full par value of the stock."

It is said that, for the protection of corporate creditors, courts will look with rigid scrutiny into every such transaction. "The reason why the capital stock of a corporation is deemed to embrace all the stock for which the members have subscribed, whether paid in or not, is, that since the members are not, in general, personally liable for the debts of the corporation, this fund is the stake held out to the public, upon the faith of which the company gains credit": Thompson's Li-

bility of Stockholders, sec. 11, and the authorities cited in the note. So far as creditors are concerned, the capital stock is regarded as a trust fund pledged for the payment of the debts of the corporation, and this is as true of the unpaid shares subscribed as of those paid up: *Adler v. Milwaukee Brick Co.*, 13 Wis. 60.

In *Sawyer v. Hoag*, 17 Wall. 620, Mr. Justice Miller says: "Though it be doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen." It was there held that creditors of a corporation had a right to examine into the action of the corporation and see how the subscriptions to the stock had been paid; and, citing *Burke v. Smith*, 16 Wall. 390, and *New Albany v. Burke*, 11 Id. 96, he says: "The governing officers of a corporation cannot, by agreement or other transaction with the stockholders, release the latter from their obligation to pay, to the prejudice of creditors, except by fair and honest dealing, and for a valuable consideration." Such conduct is characterized as a "fraud upon the public, who were expected to deal with them."

Upon a review of the authorities, we take the overwhelming weight to be, that, after stock is subscribed and the company is organized, each subscriber becomes liable for the amount of stock subscribed by him, and he can only discharge this liability by paying it in money or money's worth, in the manner indicated by the subscription and the charter or by-laws of the company; and neither the officers of the company nor the stockholders can release him from this liability without the consent of every stockholder. Each subscription, when made, becomes a conditional contract with every other person who may subscribe that the amount subscribed shall, upon the formation of the company, be paid in accordance with the terms of subscription, and when the requisite stock is subscribed, and the company is duly organized, it becomes the offer or basis of credit to the public, or to all who may deal with it, and every subscriber participating in the organization

thereby makes his subscription absolute, and is bound to pay it according to the terms of the charter and by-laws of the company, and he can discharge his liability in no other way.

As between the corporators themselves, it may be that certificates of stock, by the consent of all the members, may be issued as if paid up, without any actual payment in full or even in part; but however this may be, no device or arrangement among the corporators themselves, not made known to the public, by which the stock subscribed, instead of being paid, as the safe foundation of the credit and confidence which the company invites the public to give it, can be permitted to avail against the claims of persons who may deal with and trust the company upon the faith of its capital stock and corporate liability. By incorporation a privilege is conferred which exempts the individual members from all liability except that incurred by membership; and good faith to the public requires a strict compliance with all the obligations imposed by that membership.

It has been held in England, under what is known as the "Companies Act," which is in some respects like ours, that if a person signs the memorandum of association—that is, subscribes for stock—he is bound to take the shares from the company, and does not satisfy the obligations by taking them from some one else; and in a proceeding to wind up a company, a subscriber will not be permitted, as against creditors, to discharge himself from liability to pay for the stock for which he has subscribed by showing an understanding and agreement with the other subscribers by which, instead of paying to the company for the stock subscribed by him, he should take a portion of the stock subscribed by another in lieu of that subscribed by himself: *Forbes and Judd's Case*, L. R. 5 Chan. App. Cas. 207; *Migattis's Case*, L. R. 4 Eq. 238.

If this were not so, an association of individuals, availing themselves of the privilege conferred by the state, might, without paying a dollar, if by their subscriptions alone they could get credit, rig out this artificial being called a corporation, and embark it upon the sea of trade and speculation, and safely take the profits of the voyage if it shall prove successful, and easily escape the result of wreck and misfortune if such shall be its fate. This the authorities, English and American, concur in saying the law will not allow: Cook on Stock and Stockholders, c. 11, sec. 208; Field on Corporations, sec. 403; Thompson's Liability of Stockholders, secs. 11, 105, 124,

139; *Hager v. Cluelland*, 38 Md. 490; *Sagory v. Dubois*, 3 Sand. Ch. 509; *Sawyer v. Hoag*, *supra*; *Forbes and Judd's Case*, *supra*; *Migathis's Case*, *supra*; and the many authorities cited in them.

If it be said in the case before us that the defendant Killian was permitted to substitute the stock purchased by him from Miller (who had purchased it from Self) for the stock subscribed for by himself, and that there were no creditors and no liability to any one when this was done, the answer is, that the substitution was not warranted by the terms of the subscription, or by the charter and by-laws, and the fact is made to appear, not from the books of the company, but by parol; and the defendant could not discharge his liability in this way. "The creditors of the company, and all who may be interested in its safety or solvency, may well ask that the fund upon which they rely (the capital stock subscribed) shall really exist, not on paper, but in money, and be held sacred to discharge corporate liabilities": *Wood v. Pearce*, 2 Disn. 411; *Angell and Ames on Corporations*, secs. 146, 531.

Parol evidence cannot be received to vary the terms of the subscription, or to show a discharge in any way other than that required by the terms of subscription and the charter and by-laws: *Bank v. Littlejohn*, 1 Dev. & B. 563; *Railroad v. Leach*, 4 Jones, 340; *Cook on Stock and Stockholders*, secs. 137 et seq.

Ordinarily, persons who give credit to the corporation have no knowledge or concern as to how or the manner in which the subscriptions to the capital stock are paid, but they have a right to demand that the stock and the payments be not fictitious. Here is a company formed with a chartered capital of \$10,000, and as the record shows, a number of persons, the defendant among them, organize and enter upon the business indicated in the charter, with only \$7,000 subscribed, and of that only the sum of \$890 was actually paid in cash, and the balance in machinery, lumber, work, etc., or not at all. It does not appear what the real value of the property taken in payment of subscriptions was, and the company seems only to have had a fictitious existence, and it is not a matter for wonder that it should so soon be found in the hands of a receiver and charged with fraud; but this does not help the defendant, who participated in the organization: *Cook on Stock and Stockholders*, secs. 185, 186, 200, 210, et seq.; *Field on Corporations*, sec. 403; *Thompson's Liability of Stockholders*, secs.

12, 15, 124, 125, 126, et seq.; Morawetz on Private Corporations, secs. 589 et seq.

It may be, by the reason of the failure to subscribe and pay up the capital stock, and by organizing or pretending to organize a company with a capital of ten thousand dollars, when in fact it was neither subscribed nor paid up, the stockholders who participated in the spurious organization became individually liable to persons who dealt with them upon the faith of the spurious organization, as was held in *Hauser v. Tate*, 85 N. C. 81; see also *Dobson v. Simonton*, 86 Id. 492, and *Cook on Stock and Stockholders*, secs. 233 et seq.

However this may be, the persons who subscribed to stock and participated in the organization under the guise of the authority conferred by statute constituted a corporation *de facto*, if not *de jure*, and having held out inducements to the public to deal with and credit it upon the faith of its chartered capital, they are liable, at least to the extent of the capital stock subscribed by them, and they cannot evade that liability by any private or secret arrangement that may have been entered among themselves, or by a "simulated payment" of the stock subscribed, and if not actually paid, it may be reached by a creditor of the corporation should it become necessary: *Sawyer v. Hoag*, *supra*; *Wood v. Pearce*, *supra*.

It is said that the right of corporate creditors to object to certain transactions which may be binding between the corporators themselves "is an essentially American doctrine, based upon the principle first enunciated by Judge Story, that the capital stock of a corporation is a trust fund to be preserved for the benefit of corporate creditors"; and it has been held that creditors may have the manner in which the subscriptions have been paid inquired into, and if fictitious, or if they have been paid for in "overvalued or unreasonably overvalued property," the subscribers may be held accountable: *Cook on Stock and Stockholders*, secs. 42, 43, and authorities cited.

The defendant was a subscriber to the capital stock. An original certificate for two shares of the stock was issued to him, for which he paid nothing to the company. It will not do to say that the two shares of stock were paid for by Self, for he only paid his own subscription, and that, as the record shows, not in cash, as the terms of subscription required, but in property, rated, it may be, greatly above its value.

The defendant was president of the company, was cognizant

of all that was done, issued the stock. Can it be said that the capital stock was faithfully preserved for the benefit of those who might become creditors of the corporation?

We think not, and his honor erred in permitting parol evidence to vary and virtually annul the terms of subscription, and in the charge given.

There is error.

EFFECT OF SUBSCRIPTION TO CORPORATE STOCK, AND LIABILITY OF STOCK-HOLDERS AND SUBSCRIBERS: See the extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 806-873.

KNOTT v. TAYLOR.

[99 NORTH CAROLINA, 511.]

JUDGMENTS. — JUDGMENT RENDERED IN ACTION AGAINST PARTY THEN DEAD, FACT OF DEATH BEING UNKNOWN to the court or the other parties, is not void, but is irregular and voidable, and may be set aside upon a proper application, by motion, in the action, made within a reasonable time. The application may be made by any person having right under or derived from the deceased party, after the action began.

ORDINARILY, ONLY PARTY AGAINST WHOM IRREGULAR JUDGMENT IS RENDERED can complain of it; and if he does not, the presumption is that he is satisfied with it. It is otherwise, however, where he was dead when the judgment was rendered.

JUDGMENT CANNOT BE ATTACKED COLLATERALLY, or by an independent action, for mere irregularity. The remedy is by motion in the action in which the irregularity complained of appears.

John W. Hayes, for the respondent.

J. B. Batchelor and John Devereux, Jr., for the appellants.

MERRIMON, J. It appears from the pleadings, the orders, and judgments in this action that in 1852, the defendants Taylor and wife brought their action of ejectment, under the method of procedure then prevailing, against Joseph H. Gooch, in the superior court of the county of Granville, to recover the possession of the land described in the pleadings therein. That action, in its course, was removed to the superior court of the county of Warren for trial, and was continued from term to term for many years, and was, at the instance of the plaintiffs therein, transferred, as allowed by the statute, to the superior court of the last-named county, as established under and in pursuance of the present constitution of this state.

The defendant in that action removed to the state of Texas

and died there on the twenty-fourth day of June, 1876. The action, as appears, was never abandoned, but continued from term to term until the fall term of 1878, when it was tried "by a jury, and verdict and judgment were rendered for plaintiffs, they having no actual knowledge of Gooch's death." This judgment was "for an undivided ninth part or share of said land." No notice issued to any of the heirs at law or real representatives of said Gooch after his death, nor were they, or any of them, ever made parties to said suit; nor was any notice given to the present plaintiffs, or any of them.

Pending the action named and referred to, the defendant, Gooch, therein sold the land embraced by it, and put the purchasers in possession thereof, and the plaintiffs in the present action are in possession of about six hundred acres of that land, "holding the same by title acquired through the purchasers from said Joseph H. Gooch."

A writ of possession issued upon the judgment mentioned, commanding the present defendant sheriff to eject the said Gooch and "any person who, since the commencement of said action, has come into possession of said premises, or any part thereof," and to put the plaintiffs in that action, the present defendants Taylor and wife, in complete exclusive possession of the whole thereof, although the judgment was in their favor for "one undivided ninth part only of said land," etc.; and it is alleged that the present defendant sheriff is about to execute the said writ, etc. The plaintiffs allege further that they have placed valuable improvements on the land since they have had possession thereof; that part of them own a grist-mill, etc. They ask for relief specially by injunction, and for general relief.

A judge at chambers granted a restraining order, and afterwards, upon notice, an injunction was granted, restraining the sheriff from executing the writ of possession mentioned, further than to place the other defendants, as owners of an undivided one ninth of the land, in possession thereof with the plaintiffs.

The defendants in their answer deny the alleged irregularities in the action of ejectment mentioned, and insist that the judgment therein in their favor is effectual; they admit that under that judgment they are entitled to only one undivided ninth part of the land, and they only ask to be put in possession, as such owners, with the plaintiffs. They further insist that the plaintiffs' remedy for the grievances complained of is

by motion, or other proper proceeding in the action of ejectment, and not by this separate and independent action.

In an amendment to their answer the defendants allege that the plaintiffs, and those under whom they claim, have been in possession of the lands for fifty years, receiving the rents and profits thereof, that they are entitled to part thereof, etc., and demand an account. They further ask for an order directing partition of the lands, etc.

Afterwards, in the course of the action, the court allowed the plaintiffs to amend their complaint, so as to allege irregularities in the action of ejectment mentioned, and the judgment therein in favor of the defendants husband and wife, and also that the latter are not the owners of one undivided ninth part of the land, as adjudged in the action of ejectment; that they, the plaintiffs, are the exclusive owners of the fee therein. They allege facts putting in question the title of defendants, and title, specifically set forth as to the evidence thereof, in themselves, etc.

The defendants objected, and excepted to the order allowing such amendments to the complaint.

The defendants then denied, in their amended answer, the material allegations of the complaint as amended.

Afterwards, by consent, the court tried the action as to the law and facts, and gave judgment for the plaintiffs, from which the defendants appealed.

We are of opinion that this action should have been dismissed upon the ground that the remedy of the plaintiffs was by a proper motion in the action of ejectment referred to, in which the judgment complained of was entered. In that action, notice was given, as we must assume, in the orderly course of procedure in such cases, and Gooch, the defendant therein, appeared and pleaded. At the time of the trial thereof, there was no suggestion and proper proof of the fact that he had, before that time, died. The plaintiffs in that action could not make such suggestion, because, as appears, they had no knowledge of the fact of his death. In the absence of such suggestion, the presumption was that he was then living. The court had obtained jurisdiction of him in the action, and apparently it continued to have it, in all respects, at the time of the trial and the entry of the judgment. The latter was, therefore, not void. It was on such account irregular and avoidable, and might, under the present method of civil procedure, be declared void by the court, upon a proper applica-

cation, by motion, in the action. That might be made by any person having right under or derived from the deceased defendant therein, after the action began. This, as to the party who may make the motion, is allowable, because the defendant in the action having died before the judgment was entered, he could not make it, and in such case no presumption arises that he assented to and was satisfied with it. Ordinarily, only the defendant against whom an irregular judgment is given can complain of it. If he does not, the presumption is that he is satisfied with it. It is otherwise where he was dead at the time the judgment was given: *Shelton v. Fels*, Phill. 178; *Jacobs v. Burgwyn*, 63 N. C. 196; *Burke v. Stokely*, 65 Id. 569; *Hervey v. Edmunds*, 68 Id. 248; *Rollins v. Henry*, 78 Id. 342; *Hinsdale v. Hawley*, 89 Id. 87.

It was not according to the course of the court to try an action regularly at issue, and give judgment against a party thereto, of which it had regularly obtained jurisdiction, and apparently continued to have the same, which, in fact, it had ceased to have by reason of that party's death. A judgment thus granted is not simply erroneous, as it certainly is, but it is as well irregular, and may be set aside upon proper application in the action. All irregular judgments are in a sense erroneous, but they may be set aside in a proper case for such irregularity, if application be made within a reasonable period of time: *Lynn v. Lowe*, 88 N. C. 478, and numerous cases there cited; *Williamson v. Hartman*, 92 Id. 236; *Fowler v. Poor*, 93 Id. 466.

It is well settled by many decisions of this court that a judgment cannot be attacked collaterally, or by an independent action, for mere irregularity. The remedy in such case is, as we have indicated above, by motion in the action in which the irregularity complained of appears.

The plaintiffs contend, however, that they seek relief by injunction against the execution in the hands of the defendant sheriff, and as the action of ejectment in which it issued was brought before the Code of Civil Procedure was enacted, the latter does not apply to it, and the court cannot grant such relief in that action. This is a misapprehension of the provisions of the statute (Battle's Revision, c. 17, sec. 402) applicable. It is true that it provides that such "suits shall be proceeded in and tried under the existing laws and rules applicable thereto" at and before the time the Code of Civil Procedure took effect, but it further provides that "after final

judgment shall be rendered therein, the clerk shall enter such judgment on the execution docket required to be kept by him, and the subsequent proceedings shall be as provided for actions hereafter to be commenced." The judgment in question had been rendered in the action of ejectment, and the relief, sought after judgment, might—ought to—have been applied for just as if the action had been brought subsequent to the enactment of the Code of Civil Procedure. The court could grant all appropriate relief in equity in that action, after judgment, upon proper application, and in it as well as in an independent action, as the superior courts administer the principles of law and equity, under the prevailing method of civil procedure, in the same action. An independent action was unnecessary; indeed, it was improper. Such action will not be allowed when the relief or remedy demanded may be had in an existing action: *Long v. Jarratt*, 94 N. C. 448, and the cases there cited.

The plaintiffs might, therefore, have obtained all the relief they demanded by their complaint as at first filed in the action of ejectment referred to, which was pending and is still pending, for all proper purposes contemplated by it. Their present action must therefore be dismissed, without prejudice to them.

JUDGMENT AGAINST PERSON WHO WAS DEAD AT TIME IT WAS RENDERED IS VOID, WHEN: See note to *Evans v. Spurgin*, 52 Am. Dec. 107-110; Freeman on Judgments, secs. 140, 153.

JUDGMENT CANNOT BE COLLATERALLY IMPROVED BY PARTY on ground that it is erroneous merely: *Indiana etc. Ry Co. v. Allen*, 113 Ind. 308; 3 Am. St. Rep. 650, and note; *Kieyle v. Haslet*, 112 Ind. 515.

JUDGMENT CANNOT BE COLLATERALLY ATTACKED BY THIRD PERSONS except where the court had no jurisdiction, where the judgment was obtained by fraud or collusion, or where it was erroneously entered up, to the prejudice of the rights of such third persons: *Sidensparker v. Sidensparker*, 52 Me. 481; 83 Am. Dec. 527.

SPRINGS v. SCHENCK.

[99 NORTH CAROLINA, 551.]

PLEADING AND PRACTICE — NONSUIT. — WHEN, UPON CLOSE OF TESTIMONY, PRESIDING JUDGE INTIMATES OPINION that in no reasonable view of the evidence produced could the plaintiff recover, and, in deference to this opinion, the plaintiff submits to a nonsuit, and appeals, the evidence must be accepted as true in the appellate court, and taken in the most favorable light for the appellant, because the jury might have taken that view of it if it had been submitted to them.

LANDLORD AND TENANT. — TENANT CANNOT BE HEARD TO DENY TITLE OF HIS LANDLORD, nor can he rid himself of such relation, without a complete surrender of the possession of the land. To allow him to agree and profess to hold possession under one as landlord, and at the same time to hold covertly for himself, or for another's advantage, would be to encourage and uphold a gross fraud, which the law will never do.

WHEN TENANT, SUED FOR POSSESSION, DENIES THAT HE WAS TENANT, HE THUS PUTS HIMSELF broadly in hostility to the right of the landlord, and the latter need not prove that the term has ended, or that he made a demand for possession.

ADVERSE CLAIMANT OF LAND WHO GETS POSSESSION BY COLLUSIVE CON- CERN with the tenant of another at once becomes identified with the tenant, shares and stands in his place, and cannot resist the landlord's title where the tenant cannot do so; and he may be evicted, just as the faithless tenant may be.

WHERE ONE ENTERS UPON LAND BY SUFFERANCE, PERMISSION, OR CON- SENT OF TENANT OF ANOTHER, he will himself at once be charged by the law with the allegiance which the tenant owes the lessor, and will not be allowed to act and assume relations in hostility to the title under which he went into possession.

FACT THAT ONE WAS IN JOINT POSSESSION OF LAND WITH PLAINTIFF'S TENANT at the time action was brought, and that he had title to one half of the land, will not prevent the recovery of a judgment by the plaintiff against his tenant. But the plaintiff would have no warrant, under a writ of possession issued on such judgment, to turn out of possession the real owner of the title.

C. N. Tillett, for the appellant.

P. D. Walker, for the respondents.

MERRIMON, J. The following is a copy of the material part of the case settled on appeal:—

The plaintiff brought his action to recover the land described in the complaint, and in order to establish his title and right of possession, he introduced a deed made in 1868 by one Phelps to S. and F. Rothchild, and then a deed made in 1883 by S. and F. Rothchild to himself. He introduced witnesses who testified that each of these deeds covers the land in dispute.

He then introduced other witnesses whose evidence tended to show that the defendant Schenck had leased the land in

dispute from an agent of Phelps's prior to the date of Phelps's deed to Rothchild, and between that date and 1883 had rented the land from the agents of the Rothchilds, and that after the Rothchilds had made the deed to plaintiff, the defendant Schenck had attorned to the plaintiff, agreeing to pay to him the rent for the land. All of the evidence introduced by the plaintiff, except the deeds above mentioned, and that which related to the annual value of the land, was directed to establishing such conduct on the part of the defendant Schenck as would estop him from denying the title of the plaintiff which he had acquired by the deed from S. and F. Rothchild.

It was then admitted that the defendant Toole was in the possession of the land in dispute, and plaintiff rested his case.

The defendants introduced a deed from R. F. Davidson to Gray Toole, dated October 7, 1869, covering the land in dispute. This deed was duly proven upon the acknowledgment of the grantor, in April, 1884, and was then duly registered.

The defendant Schenck then introduced a deed from R. F. Davidson to himself for an undivided half of the land, dated October 7, 1869, and registered in April, 1883, and then denied that he had ever leased the land in dispute, or any part thereof, from Phelps or the Rothchilds, or the plaintiff, or from the agents of any of these parties.

He further testified that he and Toole bought the land in dispute in 1869 from R. F. Davidson, and that then Davidson executed the deed to Toole, which had been introduced in evidence, and thereupon he and Toole had taken possession of the land, and had held it ever since that time; that the deed was made by Davidson to Toole alone, at his (Schenck's) suggestion, though a part of the purchase-money was paid by him, and afterwards, he and Toole having had some disagreement, Davidson, at his request, and in the presence of Toole, and with his assent, had executed a deed to him for one undivided half of the land, which deed had also been introduced in evidence; that this deed was dated October 7, 1869, because that was the day of the purchase of the land by him and Toole; that the deed to Toole was made for them both, and he had paid half of the purchase-money to Davidson.

Upon the close of the testimony, the presiding judge intimated an opinion that, it having been admitted that the defendant Toole was in possession of the land when the suit was brought, the plaintiff was not entitled to recover upon the evidence against him, and if not against him, then not against

his co-defendant Schenck. The plaintiff, in deference to this opinion, submitted to a nonsuit, and appealed to the supreme court.

As the court in effect intimated on the trial that in no reasonable view of the evidence produced could the appellant recover, it must for the present purpose be accepted as true, and taken in the most favorable light for him, because the jury might have taken that view of it if it had been submitted to them: *Abernathy v. Stowe*, 92 N. C. 213; *Gibbs v. Lyon*, 95 Id. 146.

Then, accepting the evidence of the appellant as true, the appellee Schenck was, at the time this action was brought, and for several years next before that time had been, the tenant of the appellant of the land in question; and for many years next before he so became such tenant he had been the like tenant of those persons from and through whom the appellant claimed to derive title; indeed, the last-mentioned tenancy antedated in its beginning the deeds under which the appellees claim title. If this be true, and there was evidence from which the jury might have so found by their verdict, very clearly Schenck could not be heard to deny the title of his landlord; nor could he rid himself of his relation as tenant to the appellant without a complete surrender to him of the possession of the land. To allow him to agree and profess to hold possession under the landlord, and at the same time hold covertly for himself, or for another's advantage, would be to encourage and uphold a gross fraud, which the law will never do; on the contrary, the rules of law, founded in good faith and sound public policy, render such a thing impossible: *Davis v. Davis*, 83 N. C. 71; *Farmer v. Pickens*, 83 Id. 549; *Abbott v. Cromartie*, 72 Id. 292; *Pate v. Turner*, 94 Id. 47.

It was not necessary that the appellant should prove that the lease to Schenck was over, or that he made demand upon him for the possession, because the latter denied that he was such tenant, and thus put himself broadly in hostility to the right of the landlord: *Vincent v. Corbin*, 85 N. C. 108; *Waddell v. Swann*, 91 Id. 108.

If it be granted that Toole was in possession of the land, with his co-defendant, at the time this action was brought, and that he had title thereto, this fact alone could not prevent the appellant from having judgment against his tenant Schenck, because he had a sufficient cause of action against his tenant, and was entitled to his remedy as against him.

But if the appellant had thus obtained judgment against Schenck, and had taken out his writ of possession, he would, at his peril, finding Toole in possession of the land, have turned him out. The exigency of the writ would not warrant the appellant in turning out of possession one who was in, and had a right to be in, possession. In a possible case, upon proper application, the court might, under the present method of civil procedure, stay the writ of possession as to a person rightfully in possession, and not a party to the action, or the latter might have his remedy by action and injunction: *Judge v. Houston*, 12 Ired. 108; *McKay v. Glover*, 7 Jones, 41; *Cowles v. Ferguson*, 90 N. C. 308. This is not at all in conflict with what is decided in *Davis v. Higgins*, 87 Id. 298. That case has reference to the matter in litigation in that action between the parties thereto, and not to persons who are not parties, who may be in possession of the land, claiming under a valid title.

What we have thus said rests, to some extent, upon the supposition that the appellant properly suffered a judgment of nonsuit as to the appellee Toole. We are of opinion, however, that there was some evidence before the jury that they might have considered, tending to prove and from which they might have inferred collusion and a fraudulent purpose on the part of the appellees, inconsistent with the duty and obligations of the appellee Schenck to his landlord, the appellant. The former was tenant of the land, taking the strongest view of the evidence for the appellant, continuously from 1868 — first under Phelps, then Rothchilds, then the appellant — until after 1883. The jury might not unreasonably have inferred, from all the evidence, that Toole saw Schenck in possession of the land, and knew that he was such tenant; he was, at least, put on inquiry in this respect. Nevertheless, he and Schenck, on the seventh day of October, 1869, pending the tenancy, took a deed purporting to convey the land from R. F. Davidson to Toole, which was not registered until April of 1884, after this action began, in February of the same year.

So far as appears, the appellant never heard of this deed until it was registered, nor does it appear that there was anything said or done by the appellees, or either of them, at any time, that put him on notice that they, or either of them, claimed title to the land, or were holding possession thereof adversely to him. It does not appear that Davidson had any

title to the land. His deed to Toole seems only to have served the purpose of color of title. During all the time mentioned, Schenck was the tenant of the appellant. The evidence thus appearing, and unexplained, might have led the jury to infer a collusive and fraudulent purpose on the part of the appellees to ripen and perfect a title to the land in Toole, by his color of title, and his continuous possession under it—not clear and free from doubt as to its character—for more than seven years, and thus defeat and destroy the good title of the appellant, if he had one. The evidence, unexplained, does not place the appellees in a favorable light, and it implies more than mere suspicion against them. Why did they not openly claim and assert their rights under the deed from Davidson? Why did they keep it secret while they were in possession of the land, Schenck being tenant, in fact and law, of the appellant? Why did they, pending the tenancy, forbear for fourteen years to register this deed, and thus fail to give even constructive notice of their claim? Why did Davidson first make the deed to Toole for the whole land, and afterwards a second deed to Schenck for one half of it? The evidence, unexplained, suggests these and like questions that it is not easy to answer, consistently with fair dealing on the part of the appellees towards the appellant; and in our judgment, it was such as from it the jury might not unreasonably have found collusion and a fraudulent purpose, such as that suggested.

An adverse claimant of the land cannot thus surreptitiously and collusively with the tenant get possession of and hold the land to the prejudice of the title of the landlord. He has, in such case, no just possession,—has only such as is fraudulent. He takes under the tenant,—is in possession by virtue of the latter's possession,—subject to all the rights of the landlord, and he may be evicted, just as the faithless tenant may be, indeed, without reference to the tenant. When he gets possession by collusive concert with the tenant, he at once becomes identified with him,—shares and stands in his place, and he cannot resist the landlord's title where the tenant cannot do so.

And so, also, if one enters upon the land by sufferance, permission, or consent of the tenant of another, he will himself at once be charged by the law with that relation to the lessor, and he will not be allowed to act and assume relations in hostility to the title under which he went into possession. As he goes into possession with and under the tenant, he is bound by

the allegiance the lessee owes the lessor, and he cannot throw it off at his will and pleasure. The rules of law that thus establish, secure, and govern the relations between landlord and tenant, and those who get possession of the land directly under the tenant, are founded in justice, fair dealing, and sound public policy: *Callendar v. Sherman*, 5 Ired. 711; *Kluge v. Lachenour*, 12 Id. 180; *Melvin v. Waddell*, 75 N. C. 361; *Pate v. Turner*, 94 Id. 47; *Jackson v. Houser*, 7 Cow. 323; *Stewart v. Roderick*, 4 Watts & S. 188; *Dikeman v. Parish*, 6 Pa. St. 210; Taylor on Landlord and Tenant, sec. 705.

So that, whether the appellee Toole got possession of the land by collusion with or by permission of the appellee Schenck, the appellant might have recovered as against him. And as there was evidence from which the jury might have found, not unreasonably, that he did get possession in the one way or the other, the court should have submitted the issues to the jury, with appropriate instructions.

There is error. The judgment of nonsuit must be reversed, and the case tried according to law. To that end, let this opinion be certified to the superior court.

It is so ordered.

TENANT IS ESTOPPED TO DENY LANDLORD'S TITLE: See *Camp v. Camp*, 5 Conn. 291; 13 Am. Dec. 68-72; so long as he holds under that title, which is until the landlord is divested of his title by his own act or by operation of law: *McAusland v. Fumit*, 1 Neb. 211; 93 Am. Dec. 358. One who enters under tenant's possession is also estopped to deny landlord's title: *Bannon v. Brandon*, 34 Pa. St. 263; 75 Am. Dec. 655.

PEGRAM v. WESTERN UNION TELEGRAPH CO.

[100 NORTH CAROLINA, 28.]

TELEGRAPH COMPANY HAS NO AUTHORITY OR AGENCY FROM PERSON SENDING OR TO WHOM A MESSAGE IS SENT to make, modify, or alter any agreement or proposition to buy or sell contained in the message received or transmitted, or to bind a person sending or receiving such message.

RULE OF DAMAGES FOR NEGLIGENCE IN TRANSMISSION OF TELEGRAM is, that sender is entitled to recover nominal damages, and such substantial damages as he has sustained which were naturally the proximate consequence of the wrongful act; but damages cannot be recovered which may have been the consequence of secondary and remote causes indirectly growing out of a breach of the contract.

DAMAGES CANNOT BE RECOVERED FOR AMOUNT OF JUDGMENT OBTAINED BY RECEIVER OF TELEGRAM AGAINST SENDER for injury sustained by such receiver by reason of the false transmission of a message by tele-

graph company, although the company was notified by the sender to appear and defend that action, and to save him harmless, and the company failed so to do.

W. P. Bynum and P. D. Walker, for the appellant.

C. N. Tillett, for the respondent.

MERRIMON, J. The plaintiff resided in the town of Charlotte, in this state, and W. C. Sedden & Co. were doing the business of brokers in the city of Richmond, in the state of Virginia, in the year 1881.

On the 4th of February of that year, these brokers sent the plaintiff a letter, as follows: "If your customer will offer one hundred shares (or any part of it) C. C. & A. R. R. stock at forty-three, delivered here, please wire us at our expense."

Afterwards, on the 14th of the same month, the plaintiff addressed to the brokers mentioned a message in these words: "Party offers one hundred shares C. C. & A. stock at forty-three. Answer quick." And he delivered it to the defendant to be transmitted over its telegraph. It is admitted that this message was not sent truly, but that the word "three," at the end of the word "forty," was omitted, so that the message, as transmitted by the defendant, contained the word "forty" instead of "forty-three," as it should have done. The plaintiff paid the defendant sixty-two cents, the price required for sending the telegram; and the agent of the defendant understood at the time he sent the message that it referred to the stock of the Charlotte, Columbia, and Augusta Railroad Company.

In about two hours after the message was so transmitted, on the same day, the brokers named replied to the plaintiff's message as follows: "Will take the hundred shares; draw at sight, with stock attached."

Thereupon at once, on the same day, the plaintiff purchased 101 shares of the stock mentioned, and made his draft on the brokers named for \$4,343, the price of the stock at "forty-three," and sent the same to a bank in Richmond for collection, with the stock attached, with instructions to the bank to deliver the stock when the draft should be paid.

Afterwards, on the 16th of the same month, when the bank presented the draft for payment, the brokers were surprised at the amount of the same, and called upon the plaintiff for an explanation, who at once replied as follows: "My offer was forty-three, plainly, and you replied, 'Will take stock,' and bought on your reply."

The draft was not paid, and the stock was not delivered. This action is brought to recover damages sustained by the plaintiff by reason of the grossly negligent and false transmission, by the defendant, of his telegram to the brokers named above on the 14th of February, 1881, as above stated.

In the complaint, it is alleged, among other things, that in consequence of the plaintiff's telegram so falsely sent, the brokers named at once sold the stock named, then *in transitu*, to them as above stated, at the price of \$41.75 per share, which was the market value thereof in Richmond (the face value being \$100 per share); and as they failed to get the stock from the plaintiff, as they expected to do, they had to buy such stock, to make their contract good, at the price of \$41.75 per share or more; and that, in consequence of such negligence of the defendant, the plaintiff was afterwards compelled to pay the said brokers the difference between \$40 per share and \$41.75 per share of the stock, and other costs and damages, aggregating \$250.

On the trial, it was in evidence that the plaintiff did not send his first telegram mentioned, in response to the letter of the 4th of February, 1881, of the brokers to him, and that the first knowledge he had of the missending of the telegram was the information he received from the brokers, as stated above.

It was likewise in evidence that the stock named was not regularly quoted as to price; but it was quoted in the Richmond papers at \$41 to \$43, and the market value of it in Charlotte was 42.50; that propositions between Charlotte and Richmond to buy and sell stock did not go beyond the day they were made.

It was likewise in evidence that the brokers named brought their action against the present plaintiff in an appropriate court, in the state of Virginia, to recover damages for his failure to deliver the stock he so contracted to sell them; that he made active and earnest defense thereto, but, nevertheless, the plaintiffs therein recovered the sum of \$175 as damages, as well as costs, and he had to pay reasonable counsel fees and other costs.

The plaintiff offered evidence to prove that he gave the defendant ample notice of the action and its nature so brought against him in the court of Virginia, to the end it might make defense thereto, and save him harmless; that he would hold it responsible to him for any recovery that might be had

against him; that after the recovery against him, he paid the judgment, costs, etc.

The defendant objected to this evidence; the court sustained the objection, and this is assigned as error.

There was much other evidence, that need not be reported here.

At the close of the evidence, the plaintiff requested the court to give the following instructions to the jury:—

"1. That if the plaintiff was sued by W. C. Sedden & Co. in a court in Richmond, Virginia, having jurisdiction of an action for the recovery of damages arising out of the mistake in the message, and Pegram, the plaintiff, gave the defendant company reasonable notice to come in and defend the said action, and the defendant company failed to do so, and Pegram, the plaintiff, in good faith and with due diligence, defended the said action, and W. C. Sedden & Co. recovered judgment against him, the defendant would be estopped to deny its liability to the plaintiff, and the plaintiff would be entitled to recover the amount of the said judgment, with costs, provided said judgment and costs were paid by him."

This instruction was refused, and the plaintiff excepted.

"2. That if Pegram delivered his telegram of the 14th of February, 1881, to the defendant, not in answer to Sedden's letter of the 4th of February, 1881, but as an original and independent proposition to Sedden to sell him the stock, then the defendant was the agent of Pegram, and liable to him for any damages sustained by him from its gross negligence in transmitting the message."

This instruction was not given in the words asked, and the plaintiff excepted.

The court did instruct the jury that the defendant would be liable for gross negligence, and that if, by the exercise of ordinary care, the defendant could have avoided the mistake in the message, the jury should respond to the first issue, Yes.

"3. That if the jury believe the evidence, the defendant was the agent of Pegram, and liable to him by reason of its negligence in transmitting the message."

This instruction was not given in the words asked, but as above stated, and plaintiff excepted.

"4. That, apart from the estoppel referred to in the first prayer of plaintiff for instructions, the measure of damages would be the difference between the price as stated in the

Sedden copy of Pegram's message of the 14th of February, 1881, and the market value of the stock at Richmond, Virginia, on the day it was to be delivered to Sedden."

This instruction was refused, because the whole contention of plaintiff, as it appears by his complaint, was, that his damage was that he "was compelled to pay W. C. Sedden the difference between 100 shares of said stock at \$40 per share and the same stock at \$41.75 per share, and other costs and damages," etc.; and the court held that plaintiff could not recover back the damage alleged in the complaint, and has proven no other except the amount paid for the transmission of the telegram. Plaintiff excepted.

His honor stated, in his charge on the second issue, that the plaintiff had proven no damages, except the amount paid for the transmission of the message, and this is sixty-two cents.

The plaintiff excepted to the instructions and charge given, and especially assigns as errors therein that his honor, instead of the charge he gave, should have instructed the jury:—

1. That the plaintiff is entitled to recover as damages the difference between the price as stated in the telegram delivered by him to the defendant on the fourteenth day of February, 1881, and that stated in the telegram delivered to Sedden on said day, or the difference between the price of the stock as stated in the message, as delivered to Sedden by the defendant on said day, and its market value in Richmond, Virginia, on the day the stock was to be delivered to Sedden, or at the time Sedden first discovered the mistake; or that plaintiff is entitled to recover as damages at least the amount recovered of him in the action by Sedden against him, and which he paid before this suit was brought, or said amount and the cost of said action so paid by him on said amount, and the cost and reasonable expenses incurred by him in defending the said action, after reasonable notice to the defendant and its refusal to defend the same, provided said amount, costs, and expenses were paid by this plaintiff, after notice thereof to defendant, given before this action was brought; and further, that plaintiff was entitled to interest on said amount so paid by him, and certainly entitled to recover interest, if the jury should see fit to allow it.

There was a verdict for the plaintiff on the first issue submitted, and a verdict on the second issue submitted in accordance with the instructions of his honor, to wit, that plaintiff was entitled to recover, as damages, sixty-two cents.

There was judgment for the plaintiff, from which he appealed to this court.

A brief reference to the nature and purpose of the defendant's employment will serve to throw light upon the plaintiff's cause of action and the extent of damages to which he is entitled. It is a corporation invested with powers, and has functions appropriate in kind and extent, to effectuate and facilitate the transmission of intelligence from one place to another by means of electricity. The chief instrumentality it employs for its purposes is a machine, apparatus, or contrivance styled the electric telegraph, or electro-magnetic telegraph, an instrument that conveys intelligence with the velocity of lightning, by means of signals, certain mechanical movements, or sounds representing letters, words, ideas, or expressions, produced by the application of electricity—electric fluid—conducted through and along iron wires for any distance, long or short.

The business of the defendant ordinarily is to employ its telegraph for the use, benefit, advantage, and convenience of the public,—all persons who desire to take benefit of it in the transmission of intelligence that may be lawfully transmitted, upon the payment of reasonable compensation. In other words, its business is, by such means and appliances, simply to transmit intelligence—what one or more persons desire and intend to say or communicate to another or others persons at a distance—delivered to it for transmission in the shape of messages, dispatches, telegrams, or communications, usually and properly in writing. Its office and undertaking are to transmit promptly, as directed in the message to be sent, precisely what is said and expressed therein; that is, to transmit, by such signals in the way indicated above, the exact words, in their proper order and connection, as set down in the message. In the absence of special agreement, it undertakes to do, and has authority from the sender of the message to do, no more.

Generally, when it receives the message, it agrees in terms or by implication to so send it, and has no other agency of the sender, or of the person to whom it is sent. It has no authority or agency of the person sending or to whom a message is sent to make, modify, or alter at all the terms or effect of an agreement or proposition to buy or sell anything contained in the message it receives to transmit, or has been transmitted by it, or to bind a person sending or receiving such message. Its sole duty is to send the message truly and as promptly as may

be in the order of business. If it is negligent, and fails in this respect, the party injured by such neglect will have his cause of action against it, and may recover such damages as he has sustained.

Now, it appears that the defendant received from the plaintiff, and undertook, for compensation paid, to transmit for him, as directed, this message: "Party offers one hundred shares C. C. & A. stock at forty-three. Answer quick."

It sent only a part of this message,—it negligently omitted to transmit the word "three" at the end of the word "forty," thus materially changing the proposition to sell, and misinforming and misleading the party to whom it was sent, and causing the latter to send a message in reply that misled the plaintiff.

Such neglect created the plaintiff's cause of action alleged in the complaint, and he is clearly entitled to recover at least nominal damages, and such substantial damages as he has sustained; that is, such as in the course of things were naturally the proximate consequence of the wrong complained of,—such as the parties may have fairly contemplated by their contract, in case of a breach thereof; but not such as may have been the consequence of secondary and remote causes indirectly growing out of such breach.

Thus if the plaintiff, in consequence of the message received by him in reply to his falsely transmitted by the defendant to the brokers in Richmond, purchased the stock referred to, and failed to realize for it what it cost him, and reasonable compensation for his labor and trouble about it, he might recover the amount so lost and such compensation, and also the sum he paid for transmitting the message.

But he could not recover damages for any injury sustained by the persons—the brokers—to whom his message was falsely transmitted by reason thereof, because the injury done to them was not an injury to him. He had no cause of action on that account; they had, if they so sustained injury.

Nor was the plaintiff liable to the brokers for any such injury sustained by them, or on account of the breach of any contract with them created by the message as transmitted, because he did not send, or direct the defendant to transmit, the message it transmitted. He did not offer or agree to sell to the brokers the stock at "forty." They had no contract with him.

As we have seen, the defendant had no agency or authority

of the plaintiff to change or modify, in terms, the message he delivered to it to be transmitted to the brokers named. It transmitted the false message to them in its own wrong, and it alone was answerable to them for any injury they sustained thereby. The plaintiff had done them no injury. The defendant may have done so in delivering to them the false message, upon which they may have acted to their detriment. If they did not, they could not have recovered substantial damages: *Western Union Tel. Co. v. Hall*, 124 U. S. 444.

But it is earnestly contended by the plaintiff that the brokers named brought their action in a court in the state of Virginia, having proper jurisdiction, against him, and recovered judgment for damages and costs, which he paid, on account of such falsely transmitted message to them; that the plaintiff notified the defendant to appear and defend that action, and save him harmless, which it failed to do, and he is therefore entitled in this action to recover such outlay on his part, as damages.

We cannot so decide. We are unable to see how an action upon a contract never in fact made could be successfully prosecuted against the present plaintiff; and it is still more difficult to comprehend how the damages he has sustained in such action, or any outlay of his therein, can be recovered by him in this action, there being, as we have seen, no privity between the plaintiff and defendant in that respect, and no such relations subsisting as to give the former cause for redress against the defendant, measured by the results of the action referred to, the only evidence of which was the transcript of the record thereof. Such evidence would be admissible, if an agent, in performing his principal's orders, should incur a personal responsibility and loss, and seek indemnity therefor against the latter on the ground of their relations. In such case, if the principal had notice of the action, its result would be conclusive as to the extent of the damage. But this is a very different case from one of that nature.

Here the present plaintiff was not answerable to the plaintiffs in the action just referred to for injuries they sustained by the negligence of the present defendant, nor was the latter answerable therefor to the plaintiff in this action in any aspect of their relations: *Hare v. Grant*, 77 N. C. 203; *Leak v. Covington*, 99 Id. 559.

As the defendant was not answerable to the plaintiff for any injury the brokers named sustained by reason of the false

message transmitted to them by it, the plaintiff cannot recover from the defendant as damages in this action any sum the brokers may have for any cause recovered from the plaintiff.

There is no error, and the judgment must be affirmed.

In this case, Davis, J., dissented, upon the ground that the plaintiff's loss having been occasioned by the negligence of the defendant, it ought to be held answerable; and the court said: "Acting upon the reply received to the message so transmitted, he [the plaintiff] purchased and sent stock to Richmond, which, in consequence, and as a direct consequence of the misunderstanding caused by the gross negligence of the plaintiff, was there attached, and the plaintiff was put to necessary and unavoidable cost, expense, and loss"; and referring to such loss, the court adds: "It was the direct and unavoidable, not the speculative or remote, result of the negligence. I cannot concur in the view taken of the authorities cited as applied to this case."

AGENCY OF TELEGRAPH COMPANY FOR SENDER OF MESSAGE: See note to *Smith v. Easton*, 39 Am. Rep. 359-361.

DAMAGES RECOVERABLE AGAINST TELEGRAPH COMPANY FOR NEGLIGENCE in delivery of message are such as flow naturally from the breach of the contract, or such as may fairly be supposed to have been in contemplation of the parties: See *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 4 Am. St. Rep. 126, and note; and see the note to *Western Union Tel. Co. v. Reynolds*, 46 Am. Rep. 731-733.

HALLIBURTON v. CARSON.

[100 NORTH CAROLINA, 99.]

EXECUTOR IS NOT BOUND TO SET UP STATUTE OF LIMITATIONS AS DEFENSE to claim against estate of deceased debtor, but may pay the same notwithstanding the statutory presumption of payment, and is entitled to credit therefor in his administration account; particularly so where the testator before his decease had declared that he owed such claim, and had expressed a wish that it should be paid.

EXECUTOR IS COMPETENT WITNESS TO FACT THAT TESTATOR HAD DECLARED TO HIM, just before his death, that he owed a certain debt claimed to have been barred by the statute of limitations, and that he wished such debt paid; sections 580 and 590 of the North Carolina code do not make such witness incompetent.

CONFLICT OF JURISDICTION. — EXECUTOR WHO PAYS IN OBEYANCE TO TESTATOR'S DEBT on a bond, in accordance with a prior decision of the supreme court of North Carolina, will be protected, although such ruling conflicts with the decisions of the United States supreme court.

J. G. Bynum and G. N. Folk, for the respondents.

J. B. Batchelor, John Devereux, Jr., P. J. Sinclair, and W. H. Malone, for the appellants.

SMITH, C. J. This suit, instituted in January, 1876, by the plaintiffs, executors of Jacob Harshaw, who died in 1868,

against the defendant John Carson, executor of George M. Carson, on behalf of themselves and other creditors, is to enforce a sale of the devised land of the testator, George M., in order that the proceeds, as far as necessary, may be applied to the discharge of his indebtedness, upon an allegation of an exhaustion of the personal estate. The devisees were subsequently made co-defendants.

After the complaint and other pleadings were put in, an order of reference, by consent of counsel, was made to John D. Shaw, to take and state the administration account, and to ascertain and report: 1. The number and value of the shares received by the several legatees, and when taken possession of by each; 2. The value of each of the tracts of land devised by the testator, George M.; and 3. The refunding bonds executed by the legatees, each set out in its essential particulars.

At spring term, 1881, the defendant Emily Carson having died the year previous, her administrator was permitted to become a party in her stead, and he filed an answer, adopting that of J. McD. Whitson and wife, Rebecca, and of — Gowan and wife. At June term, 1883, the relations between the original defendant, John Carson, and those subsequently introduced into the action being adversary, the said Whitson and wife, on behalf of all of the defendants last mentioned, put in an answer controverting the allegation contained in the answer of the former, the executor, to which he made reply.

The referee made his report, to which objections were taken, and upon motion of counsel for the contesting defendants, by whom we designate all except the executor, and upon the ground of newly discovered matter omitted in the report, it was set aside, except in so far as it ascertains the plaintiffs' debt, and as to this it was confirmed. It was then by consent referred to W. W. Flemming to find particularly the sum due the plaintiffs, and he did so during the term, reporting a balance of \$3,373.37, whereof \$2,167.64 is principal money.

Thereupon, at the instance of plaintiffs' counsel, it was "considered by the court that the said sum of \$3,373.37, being principal and interest, is the amount of the debt of the plaintiffs, and that they are entitled to judgment ascertaining the same, but in what proportion the same shall be paid by the devisees of said George M., and others, and at what time, is left open for adjudication when the report of G. F. Bason, to whom the cause has again been referred for an account, shall be returned." And it was further ordered "that this cause be

recommitted and referred to George F. Bason to take and state an account of the estate of George M. Carson which has come, or ought to have come, from all sources into the hands of John Carson, the executor, and what disposition has been made of such estate, and especially that he state what funds have come into the hands of the said executor from the estate of William Carson [he being also executor of the latter], which ought to be subjected to the debts of any one, and to him as executor of George M. Carson; what personal property of the estate of said George M. came to the hands of each of his legatees, and the value thereof; what real estate of the said George M. came to each of his devisees, and the value thereof; and in case it shall appear that there is not in the hands of the executor sufficient assets to pay off the plaintiffs' debt, then to ascertain and report what sum each of the devisees, including the executor, is liable to contribute to the payment of the plaintiffs' debt; that in ascertaining what sums ought to have come into the hands of the executor, the referee may inquire what estate, either by devise, descent, conveyance, or gift, if any, has come to the executor from the estate of William Carson, subject to the payment of debts due him as executor of said George M.

"The referee will find all the facts that he deems material, and state his conclusions of law; state his account separately, and report to the next term."

The referee proceeded to execute the commission, and made the required report, with separate findings of fact and of law, arising upon them, from which it appears that the executor has paid towards the liability of the testator, and the expenses of administering the estate, in excess of the assets, with which he is chargeable, the sum of \$3,341.92.

Exceptions, twelve in number, were filed by counsel of the contesting defendants, after the ruling upon which, and exceptions entered thereto, in so far as they were not sustained, the account was re-referred to the same referee for reformation in the particulars requiring correction, and again reported to the court, with the evidence taken upon the matters in controversy. Of this report it is not out of place for us to remark that it indicates great care and painstaking, and the bestowal of much labor in eliminating from the mass of evidence the points in dispute, and in presenting them in a clear and intelligible form for the reviewing court.

Similar objections are made by the same party to the re-

formed report, nine in number, whereupon the court proceeded to render final judgment, and the contesting defendants appealed.

The question whether the lands devised to the executor in the codicil to the will, made after the death of some of the devisees, were primarily liable to be sold to meet the demands against the testator's estate in relief of the other devised lands, or whether all were to contribute, was decided when that matter was before us, upon a former appeal, in favor of an equal liability, and is now put out of view: *Halliburton v. Carson*, 86 N. C. 290. We premit an examination of the exceptions to the referee's first report, for the reasons: 1. That it is embodied substantially in the last, to which a new series of exceptions has been filed; and 2. Because the argument here upon points excepted to, and expected to be decided upon the appeal, has been confined to this series. Indeed, the argument for the appellant was still more restricted, calling our attention only to a part of that series of rulings to which error is imputed. We limit, therefore, our inquires into the sufficiency in law of the exceptions to the last report.

1. The first exception is to the referee's conclusions that the statutory limitations of three, seven, and ten years, as well as the statutory presumption of payment, is not available as a defense to claims paid that had been due more than ten years as an allowed credit to the executor. The objection applies to the claims, the vouchers showing payment, which are numbered 7 and 16 in the report, and which had been overdue, and were reduced to judgment without resistance by the executor, and afterwards paid. These claims are due to Martin E. Carpenter, by two notes under seal, each in the sum of \$550, on May 9, 1850, and executed by the testators, George M. and William, suits to recover which were commenced on January 30, 1867, and to R. C. Burgin, guardian of James Conley's heirs, by note under seal, executed by J. L. Carson, principal, and George M. Carson and John Carson, sureties, for \$2,262, principal and interest, when reduced to judgment, the last payment being made by A. Burgin, administrator of the principal debtor, on July 5, 1873, of \$259.50, generally against the surety John Carson, and guards against the representatives of the other obligors, at fall term, 1869.

The defense to these credits is, that more than ten years had elapsed after the maturity of the bonds, and they are presumed to have been paid, and are barred by the statute of

limitations applicable to claims against the estate of deceased debtors.

2. The admission of the testimony of the executor to show the subsisting indebtedness of the testator, George M., to Carpenter and others, which consisted of his declarations made to the witness, whom he made executor in some three months before his death, in which conversation he said he wanted the Carpenter debt paid. The objection to the declaration of the deceased is based upon the prohibitory provisions of the code, section 590.

The referee, in our opinion, misconceives the nature of the objection to the allowance of the credits in requiring them to be set out with the same particularity as the rules of pleading require when the statutory bar is relied on to defeat the plaintiffs' action. The complaint is, that the executor did not set up this defense, and thus protect his testator's estate from the demands, and that he was remiss and neglectful of official duty, and should bear the loss himself. The bonds are not in suit, and no statutory bar can now be set up. The strict rule of pleading which the referee invokes in support of his action has no application to the case, and the controversy as to any particular item of claim and resisted credit springs up when it is offered in the taking the account, and must be disposed of by the evidence in support of and in opposition to its allowance then to be produced and heard. The only inquiry is, Shall, under such circumstances, money paid upon a debt presumed to have been paid before be admitted without proof in rebuttal showing that it has not been paid, or that, acting in entire good faith, the executor had sufficient reasons for his belief and action in making the payment?

Now, as to the Carpenter notes, if the evidence of the executor is to be received, the testator, just before his death (and perhaps after making his will, for its date is not given), declares to the person who is to settle his estate that he does owe this debt, and another due to a named creditor, as well as some others of small amount and not specified, and wishes it to be paid, and in his will he provides for the payment of all his just debts. If, then, the testimony, coming from the source that it does, is admissible, it fully rebuts the presumption of payment, and leaves the debt as subsisting in full force, notwithstanding the lapse of time, and justifies the executor in submitting to the judgment without resistance.

We come now to consider the competency of the witness to

testify to the declarations of the testator, under sections 580 and 590 of the code, the interpretation of the latter of which has been a prolific source of controversy heretofore. The main purpose to be subserved in the enactment is, as stated by the late chief justice in *McCanless v. Reynolds*, 74 N. C. 301, and reiterated in *Thompson v. Humphrey*, 83 Id. 416, that of the parties to a transaction or communication, one being dead, the survivor shall not be permitted to speak of it, because the mouth of the other is closed, so that his version cannot be heard. This, however, presupposes some antagonism of interest as to the subject-matter of the evidence then existing, which might be favorably affected as to one and unfavorably as to the other of the parties between whom it takes place. Thus, when the controversy was as to whom the deed was made by the grantor, he was allowed to testify that it was to deceased party, under whom the defendant claimed, because there was no controversy as to the witness's ownership, and he was indifferent as to the results of the issue: *Gregg v. Hill*, 80 Id. 255.

And so are held to be competent, as outside the purpose of the statute, declarations and acts of the deceased upon a question of mental capacity, through whatever witness the testimony is derived: *McLeary v. Norment*, 84 N. C. 235.

In the case before us, the executor, being also a legatee and devisee, had a common interest with the others in refusing to allow the debt, and exonerating the trust estate therefrom. He would, in this, be promoting the interest of each, and not his own, separate from theirs.

With such information as he had from such a source, not to be distrusted, and under a sense of fiduciary duty, could he rightfully repudiate the liability of his testator, and resist the obligation under the technical rule of presumption opposed to fact? or, if he does not, expose himself to the loss of the whole sum paid?

It is true that in *Barnawell v. Smith*, 5 Jones Eq. 168, Battle, J., distinguishes between the liability incurred by an executor or administrator, in refusing to set up the statutory bar which puts an end to the action, and in not taking advantage of the presumption of payment raised by the lapse of time, declaring him responsible in the latter case, unless, when a credit for the expenditure is claimed, he can repel the presumption, while in the other he may exercise his own discretion. He says that, before paying the demand against

which the presumption operates, he "ought to show that the presumption was untrue, and that, in fact, it had not been paid or satisfied," before permitting a judgment to be recovered, or making payment.

But if he has personal knowledge or ample proof of the indebtedness as still subsisting, and acts upon either, we are unable to see why he should be held personally responsible, and be denied the opportunity of giving his reasons therefor under the old or the recently amended rules of evidence. In all cases he must act in good faith in protecting the trust estate against unjust demands, but not against those that are honest and just. The law does not require of him, in the expressive words of another, in opposition to an argument, that it was the legal duty of the representative to plead the statutory bar, "to make him sin in his grave"; and such is the well-established doctrine in this state, under numerous adjudications of this court.

And again, assuming the testimony incompetent to prove the fact of non-payment, why is it not admissible to refute the charge of culpable indifference and inattention, and show wherefore the indebtedness was not contested, and the good faith of the executor?

"The legatees or next of kin," remarks Gaston, J., "cannot, in conscience, object to payment, whether voluntary or compulsory, made by the representative of the estate of what was justly due therefrom. In equity, as respects legatees or next of kin, the estate consists only of what remains after satisfaction of the creditors": *Williams v. Matland*, 1 Ired. Eq. 92.

Suppose the presumption could have been repelled by frequent admissions and acts of the debtor to be proved by an indifferent witness who dies before the administration account is taken, so that any resistance to the action would have been fruitless, must the executor, who pays the amount after judgment, be disallowed the credit because the proof cannot then be had? And shall he not be permitted to show his reasons for making a useless opposition to the recovery? Yet these consequences might follow the adoption of the principle that applies to an action upon the claim itself when in suit, in a controversy growing out of its payment. Unless some difference is recognized, very great hardship might come to the most careful and honest trustee in the discharge of his official duties, and for which the enabling statutes in the code were specially intended, as is apparent from their structure and scope.

The rule would be very stringent which imposed so great responsibility upon a fiduciary agent left unprotected, when his disbursements, made in fidelity to his trusts, are to be disallowed because of inability to produce the proofs upon which the claim could have been established, and when resistance would have entailed needless expense. The executor "is answerable only," says Nash, C. J., in *Deberry v. Ivey*, 2 Jones Eq. 370, "for that *crassa negligentia*, or gross neglect, which evidences *mala fides*." To the same effect are *Nelson v. Hall*, 5 Id. 32; *Mendenhall v. Benbow*, 84 N. C. 646; *Patterson v. Wadsworth*, 89 Id. 407. We therefore sustain the rulings of the judge upon these two exceptions.

The Burgin judgment, in many of its features, is similar to that which has been discussed. In some respects, it has peculiarities of its own. John Carson was himself a surety obligor, and if the pleadings were to be verified by oath, how could he swear that the debt had been paid when he knew it had not been? and why should he be required to set up for his testator a defense he would not set up for himself? It would be evasive to say the debtors relied upon the protection of the statute, when its presumption was known to be untrue. His duty to the estate cannot be such as to require him to do for its exoneration what he could not conscientiously do for his own. Their interests are one and the same, and every motive was against any dereliction of duty in the premises to both.

Besides this, he was not bound to set up an unjust though legal defense, as the condition of his own recovery from the principal debtor, or from a co-surety, his ratable part of what he may have been compelled to pay, by reason of his personal liability. This has been expressly decided when the surety failed to plead the statute of limitations to a demand from which it would have protected him, inasmuch as his right of action commences at the payment: *Sherrod v. Woodard*, 4 Dev. 360; *Jones v. Blanton*, 6 Ired. Eq. 115; 51 Am. Dec. 415.

"There was no obligation on the plaintiff, in law or in equity," are the words of Nash, C. J., in the last-cited case, "to plead that statute [protecting the sureties from liability upon guardian bond, after three years, from the ward's becoming of age, and not calling him to an account], or rely upon the protection it gave him"; citing *Leigh v. Smith*, 3 Ired. Eq. 442; 42 Am. Dec. 182; and *Williams v. Maitland*, *supra*. This was said of the plaintiffs' claim for a contribution from a co-surety to the bond.

Why is it more his duty to rely upon a defense not less unconscientious furnished in the statutory presumption?

With the funds in his hands, the appropriation was at once made by the law: *Ruffin v. Harrison*, reported in 81 N. C. 208, and upon the rehearing, in 86 Id. 190. There was therefore no limitation resulting from the lapse of time afterwards depriving the executor of his right to a credit upon a settlement of the estate.

3. The next exception, pressed with earnestness and force by appellees' counsel in argument, is in allowing a credit for an alleged premium, entering into the judgment rendered upon the bond due to Jacob Harshaw, the plaintiffs' testator, and executed by J. L. Carson, William Carson, and George Carson, on April 20, 1860, and payable upon its face "in United States coin." It was reduced to judgment at fall term, 1869, of McDowell superior court, and the record thereof was produced before the referee Shaw, showing the amount recovered to be \$4,326.45, and upon the back of the bond, besides an indorsed payment of \$198.33, is an entry, as follows:—

P'l [intended for principal].....	\$2,167 64
Int. to 2d September, 1869.....	1,037 14
Gold premium, 35 per cent.....	1,121 67
	<hr/> \$4,326 45

This entry, as well as the computation of interest accrued, sufficiently shows that the premium upon gold has been added to the amount due upon the face of the bond, which, it is not denied, measured the difference in value between gold and national currency at the date of the judgment. This method of conversion of the one into the other fund is in accordance with the decision of this court in *Robeson v. Brown*, 63 N. C. 554, while it is at variance with that of the supreme court of the United States: *Bronson v. Rodes*, 7 Wall. 229, and *Butler v. Horwitz*, 7 Id. 258, wherein the currency in the contract is preserved, in kind, in the judgment, and in the execution that follows. The executor, acting upon the rule laid down in this court, is warranted in not resisting the recovery of the sum thus augmented by the premium upon coin, and payable in national currency; nor is there any principle in law or equity known to us, nor any authority referred to by counsel, on which, in consequence of the appreciation of the latter to the level of the former in value, the debt can be reduced, as it could not be increased in case of depreciation.

Besides, the sum adjudged due, in the ruling upon the report of the referee Flemming acquiesced in, and not the subject of exception, is thus conclusively settled in this very action, and cannot come up again, except upon a revisal of that adjudication, upon a proper application to the court.

It is unnecessary to consider the original judgment against the executor, and inquire if the statute of limitations can still be set up, in opposition to the present proceeding, to charge the devised land with the debt; and it is only necessary to say that the ruling in *Bever v. Park*, 88 N. C. 456, has been misunderstood, and the mistake explained and corrected in *Speer v. James*, 94 Id. 417, where the subject-matter of the relations between the personal representative of a deceased debtor and his devisees and heirs at law is fully considered.

The other exceptions, based upon alleged erroneous rulings upon the law, for none others are before us in this appeal, without special and separate reference to each, must be overruled.

There is no error, and the judgment must be affirmed, and it is so ordered.

POWER OF EXECUTOR TO REVIVE DEBT BARRED BY STATUTE OF LIMITATIONS: See note to *Briggs v. State*, 12 Am. Dec. 659-661.

EXECUTOR OR ADMINISTRATOR IS NOT BOUND TO PLEAD STATUTE OF LIMITATIONS: *Baker v. Bush*, 25 Ga. 594; 71 Am. Dec. 193, and note; *Shross v. Joyce*, 36 N. J. Eq. 44; 13 Am. Rep. 417.

WILLIAMS v. LEWIS.

[100 NORTH CAROLINA, 142.]

WILL — CONTINGENT LIMITATIONS — PARTITION. — Where testatrix devised land to certain of her children, with a provision that upon the death of either without heirs the portion of the child so dying should go to the survivor, the time when the contingency is to happen is the death of the respective devisees without an heir, — that is, without children then living, — and no earlier period, and the estate should then go to the survivor; and where it was also provided that in case of the marriage of either, then there should be a division of the estate, the postponed division shows that it was not the intention of the testatrix to confine the contingency to the period of her own life.

WILL — ESTOPPEL BY PARTITION — CONTINGENT LIMITATIONS. — Where land is devised to children of the testatrix to hold equally until certain contingencies, upon the happening of which a division was to be had, and also upon a contingent limitation that upon the death of one without heirs that portion was to go to the survivor, a judgment of partition

does not estop the survivor from claiming his share upon happening of the contingent limitation. The partition separates into parts that which was before held in common as a whole, and no more disturbs the limitations than would have done a devise of the several portions to the respective tenants by the testatrix.

F. A. Woodard and C. M. Cooke, for the respondents.

Jacob Battle, for the appellants.

SMITH, C. J. The controversy in this action arises out of the conflicting interpretations of the will of William Jane Bryant (under which both parties derive their claim of title), who died in August, 1872, shortly after making it.

The testatrix, after giving to her daughter Medora fifty acres, to be taken from the southern portion of her tract of land, to be run off and allotted to her by her executor, which has been done, devises as follows:—

“Item 3. I will and devise that my son Robert and my daughter Ellen have two hundred acres of land, laid off in good shape, to include all the houses and improvements, to remain undivided until Robert becomes of age, or until one of them gets married, then to be equally divided between them.”

“Item 5. I give and bequeath unto my son John Bryant all the balance of my tract of land, being about 105 acres, to him and his heirs forever”; to which, elsewhere, she adds certain pecuniary bequests.

“Item 9. I will and desire that should my son John die leaving no heir, I will and desire that Ellen and Robert heir his part of my estate; and should Ellen or Robert die leaving no heir, the surviving one to heir the estate of the deceased brother or sister.”

The two hundred acres mentioned in the third item of the will were, soon after the death of the testatrix, cut off by the executor, and allotted to Ellen and Robert, who entered into possession, and jointly occupied the same until November, 1876, when Ellen, the *feme* plaintiff, intermarried with Henry C. Williams, who and herself are the parties to the action; and thereupon, at their instance, and in association with Robert, under proceedings in the superior court, before the clerk, the land was divided, and the moiety of each tenant assigned and set apart to her and him in severalty.

Robert was, at that time, a minor; but he became of age before 1882, in which year he conveyed, by deed, the tract which he held to the defendant, George N. Lewis, in fee. Robert died in 1886, never having married, and without issue.

The plaintiffs construe the limitation as dependent upon there being no issue living at the time of Robert's decease, and insist that, the contingency having happened, the estate of Robert vests, under the will, in Ellen, his surviving sister. The defendant claims that, to make the limitation valid and effectual, the death without issue must occur during the testator's lifetime, or at least before the period specified for a division, and that this not having happened, the estate of Robert became absolute and free from the contingent limitation. The solution of this controversy determines the title and the consequent result of the action.

We do not attribute to the proceedings for partition the effect of an estoppel, since this is in accordance with the provisions of the will, and it must be consistent with itself. The partition separates into parts that which was before held in common as a whole, and no more disturbs the limitations affixed to the devised estates than would have been a devise of the several portions to the respective tenants by the testatrix herself. Indeed, the separate parts are, after the partition directed, as truly held under the contingent limitations as were previously thereto the undivided estates of each in the entire three hundred acres. There was no estoppel, therefore, in executing the directions of the testatrix; and the recital of the devising clause in the petition shows such was the intent and understanding of the parties to the proceeding, and that it was not to supersede or disturb the conditions annexed to the devised estates of the tenants.

The only question, then, is as to the time when the contingencies are to happen, if at all, so as to give effect to the ulterior limitations. In our opinion, the time contemplated by the testatrix is the death of the respective tenants without an heir, — that is, without children then living, — and no earlier period. The postponed division shows that it was not the intention of the testatrix to confine the contingency even to the period of her own life, for, in such case, there would be no partition to make; nor was it her purpose to restrict it to the time of making the division, which was but a severance of the estates, and left the relations between the devisees the same as before.

Taking the terms of the instrument as a guide to us in finding what the testatrix meant, and without superadding words that she does not use, it is to us manifest that the estate should remain in each devisee until his or her death, and

then go over to the survivor, if no children or child were left by the deceased.

The subject is so fully considered in the cases of *Galloway v. Carter*, 100 N. C. 111, and *Buchanan v. Buchanan*, 99 Id. 308, decided at this term, that we deem it useless to protract the discussion. There is no error, and the judgment must be affirmed.

CONSTRUCTION OF TERM "DYING WITHOUT ISSUE," IN WILL: See note to *Quackenbos v. Kingsland*, 55 Am. Rep. 774-782. As to effect and validity of limitation over, see *Combs v. Combs*, 67 Md. 11; 1 Am. St. Rep. 359.

WORDS OF SURVIVORSHIP RELATE TO THE PERIOD OF DIVISION: *Presley v. Davis*, 7 Rich. Eq. 105; 62 Am. Dec. 396.

MICHAEL v. FOIL.

[100 NORTH CAROLINA, 178.]

NOTWITHSTANDING STATUTE OF FRAUDS, EVIDENCE IS ADMISSIBLE OF PAROL AGREEMENT AS TO PROCEEDS OF SALE OF LAND, although the contract for the sale of the land was in writing, if it was made subject to the agreement as an inducement to such contract.

EVIDENCE. — Where the plaintiff has testified to a certain agreement relative to the proceeds of a sale of land, it may be shown by a third party that a certain letter relative to such sale was written to the plaintiff by the defendant, and signed by such third party, both for the purpose of corroborating the plaintiff and also to show that the defendant recognized the plaintiff as interested in the sale.

IF AN ATTORNEY ACTS FOR SEVERAL CLIENTS, HE CANNOT TESTIFY WITHOUT THE CONSENT OF ALL, and this is true as between his clients, or any of them, and third parties; but where the controversy is between the parties themselves, the rule does not obtain.

STATUTE OF FRAUDS. — It is not error to refuse instructions that an agreement as to the proceeds of a sale of land is void because not in writing.

INSTRUCTIONS. — It is not the duty of the court to charge the jury upon a single selected fact, nor is he bound to give the charge in the language asked.

DOCTRINE OF REASONABLE TIME APPLIES TO AN AGREEMENT AS TO THE PROCEEDS OF A SALE OF LAND where no time is specified; and when it is stated in such agreement that the land should be sold within the plaintiff's "lifetime," it should not be limited to a shorter time.

W. H. Bailey, for the appellant.

B. F. Long and W. G. Means, for the respondent.

DAVIS, J. Civil action, tried before Connor, J., at January term, 1888, of the superior court of Cabarrus County. Defendant appealed.

1. The plaintiff alleged that in 1881 he conveyed, by deed in fee, to the defendant a tract of land mentioned in the complaint for the sum of five thousand dollars.

2. That at the time of the execution of the deed, and before, it was contracted and agreed that the plaintiff would take five thousand dollars for the land, provided the defendant would pay to him one half of the proceeds for which the mineral interests of said land should be sold, if the defendant, during his lifetime, should sell said mineral interests; the defendant agreed to these terms, and the deed was executed without embracing them, but subject to them.

3. That in 1883, the defendant sold the land and mineral interests to W. H. Orchard for six thousand dollars, and received the money therefor,—the mineral interests for one thousand dollars, and the land for five thousand dollars.

The plaintiff demanded of the defendant the one half of the proceeds of the sale of the mineral interests, which was refused, and this action is brought to recover it.

The defendant admits the purchase of the land by him at the price of five thousand dollars, but denies the other allegations.

The following issues were submitted to the jury without objection:—

“1. Did the plaintiff and defendant contract before and at the time of the execution of the deed from the plaintiff to the defendant, the deed being made subject to the contract, that plaintiff should take five thousand dollars for the land, and the defendant would pay plaintiff one half of the proceeds for which the mineral interests in said land should be sold, if defendant should, during his lifetime, sell said mineral interests?”

“2. Did the defendant, on or about the eleventh day of April, 1883, sell the mineral interests? and if so, what was the price paid therefor?”

“3. What sum of money, if any, is due from the defendant to the plaintiff?”

George W. Michael, the plaintiff, was introduced in his own behalf and testified:—

“I sold the land to the defendant, March 15, 1881, for five thousand dollars.”

The plaintiff's counsel then proposed to ask the witness the following questions:—

“Was there any agreement made at the time in respect to

the proceeds of the sale of the mineral interests in the lands which was not embraced in the deed?" A. "There was."

"Was such agreement in writing?" A. "It was not."

"What were the terms of said agreement?"

Defendant objected, for that the agreement proposed to be proven was concerning an interest in land, and could only be shown by some writing, signed by the defendant.

Objection overruled. Exception by defendant.

"The agreement was, that I was to have one half of the proceeds of the sale of the mineral interests in the land, if sold during my lifetime."

"The agreement was made in Mr. Puryear's office. He drew the paper. I paid him for it. On the same day, and after the deed was made, the defendant said that he would attend to the sale. We agreed that Mr. Richards should go and show the mine to any person who might wish to buy. I received a letter from Mr. Richards about the sale. After I heard that defendant had sold, I came to North Carolina, and demanded pay for my share of the proceeds of the mineral interests. The defendant declined to pay it. I told him that he knew that it was a fair contract. He said he only got one thousand dollars for the mineral interests. He sold to Captain Orchard. He said that he never would pay me; that he would keep it in court as long as he lived. The agreement was, that Richards and Foil were to sell for our benefit."

The plaintiff's counsel then proposed to read a letter from Richards to plaintiff, and Richards was called, and testified that he signed the letter, and Foil, the defendant, wrote it.

The defendant objected. Objection overruled. Defendant excepted.

The following letter was then read for the purpose of corroborating the witness:—

"CONCORD, NORTH CAROLINA, May 21, 1881.

"MR. GEORGE W. MICHAEL.

"*Dear Sir*,—I mailed you a letter some three weeks ago as to selling the mining property on Foil's plantation, and have not received an answer yet, nor has Mr. Foil. I directed your letter to Ashboro, Illinois, so I write again. If you want to sell your interest, I am of the opinion you can do so if you offer it at a low price. I think Mr. Foil is out of patience, as well as myself, as you have not written to either of us. Our plan is to make hay while the sun shines. Several parties

have been here, and will not consider any sale until I hear from you. Have a speedy answer, or all be go-by. Put your price low down, if you want to sell,—no mistake. Foil is ready to sell at any price to make a sale. Let me know your price, at a low rate, at that. With my best wishes to you and family, I remain,

Yours truly,

“WILLIAM RICHARDS.

“Direct your letter: William Richards, Concord, North Carolina, care of A. Foil.”

Mr. Hal Puryear was then introduced by the plaintiff, and testified:—

“I drew a deed for the plaintiff to the defendant. It was drawn in my office. The first time I heard of the matter, Mr. Foil met me, and said that he was about to buy some land from Michael; that they wanted me to draw the deed. They came to my office, and I did so. Mr. Michael paid me.”

The plaintiff then proposed to ask the witness:—

“What took place between the parties at that time, in your presence?”

The defendant objected, for that the witness, an attorney at law, was in the employment either of himself, or the plaintiff and himself, and that the conversation in his presence was, as to him, confidential.

The objection was overruled. Defendant excepted.

“I heard the parties say that when the land was sold the plaintiff was to have one half of the proceeds of the sale of the mineral interest. This is impressed on my memory. I heard it twice. That was their agreement. Michael wanted to retain one half of the mineral interest, and insert a reservation to that effect in the deed. This was objected to by Foil. I then suggested a collateral agreement in writing, and wrote it. Foil refused to sign it. The agreement was in parol that Michael was to have one half of the proceeds of the sale of the mineral interest.”

The plaintiff then put in evidence the bond for title from the defendant, Foil, to W. H. Orchard, for the mineral interest in said land, dated April 2, 1883, by the terms of which he was to convey to said Orchard the mineral interests, with the timber on twenty-five acres, and other privileges not material to be stated, for the sum of one thousand dollars. On the bond is the following indorsement:—

“Received of William Treloar the sum of one thousand dollars, for one half interest in the within bond, and a second

bond covering the mineral interest of said tract, the said bond bearing even date with this instrument.

"April 2, 1883.

W. H. ORCHARD.

"On the payment of one thousand dollars more, I agree to transfer all of my right, title, and interest in the within bond, as well as the bond mentioned above.

"April 2, 1883.

W. H. ORCHARD."

The plaintiff then put in evidence the bond for title to the said land from the defendant, Foil, to Orchard, dated April 2, 1883, in which he enters into the obligation to convey the land to the said Orchard in fee, for the sum of six thousand dollars.

The plaintiff then introduced a deed from Foil and wife to W. H. Orchard, dated April 18, 1883, conveying to the latter the land in fee for the consideration named therein of six thousand dollars.

He then offered in evidence a deed from himself and wife to the defendant, Foil, dated December 27, 1880, conveying to him the said land in fee for the consideration named therein of five thousand dollars, "to have and to hold three fifths of said land to him, said party of the second part, and his heirs, as trustee for Nancy E. Melchor, and the other two fifths to him, the said Foil, and his heirs."

The defendant then testified, in his own behalf, as follows:—

"The plaintiff came to me and offered to sell his land. Said that he wanted to leave the state. Something was said about a gold-mine. He charged five thousand dollars for the land. I declined to take it, but offered four thousand dollars, and permit him to retain four acres and a right of way to the mine. He finally agreed to rent the land for that year, and pay me nine bales of cotton rent, and I agreed to give five thousand dollars for it. Mr. Puryear wrote the deed. I employed him to write it. Michael wanted to insert a reservation of one half of the mineral interest. I declined to permit it; but told him that he was to open the mine and have half of what he got from the sale of the mineral interest. I did not agree with him to give him one half of the proceeds of the sale of the mineral interest. Orchard never paid me anything for the mineral interest. He paid me for the plantation. I made some improvements on the land, amounting to about \$170. When I sold, there was a crop on it—wheat, etc.—worth about seven hundred dollars. My interest was about one third."

Cross-examined, he said: "I have no recollection that Mr. Puryear, at the time of writing the deed, suggested that the reservation be put in the deed. I do not think Michael was present. He and his wife signed the deed the day that it was written. When I sold the land to Orchard I had been in possession two years. The first year I got about four hundred or four hundred and fifty dollars rent for it. The improvements were put on the land before I sold to W. H. Orchard. I put some after I made the bond to Orchard. Mr. McDonald came to me and wanted a bond. I refused to give it. I told him that I had promised Michael that if he opened up the mine he was to have one half of it; that he had a chance on it. I wrote the letter in evidence at Mr. Richards's suggestion. I sold the farm to Orchard. I claim no interest there now. I considered the mineral interest worthless. I made a bond to Orchard to sell it to him for two thousand dollars."

The plaintiff then introduced William Richards, who testified:—

"Some time after Michael left I came to town to see Mr. Foil, to ascertain what he would take for the mineral interest. He said that he could not sell without Michael's consent; that he owned one half interest. I told him that could be easily fixed; that we could write Michael. He then wrote the letter in evidence and I signed it. When Orchard bought, I asked defendant if he had sold the mineral interest, and he said yes."

It was conceded that both of the bonds from defendant to W. H. Orchard came from the custody of Mr. Treloar.

The defendant requested the court to instruct the jury:—

"1. That the agreement alleged by plaintiff, and shown by his testimony, even if made, is void by reason of the same not being in writing, signed by defendant or some agent of his.

"2. That it being admitted that the four-thousand-dollar bond to Orchard had never been surrendered, being executed at the same time as the other bond to Orchard, they should be construed together as forming one transaction, and the proper construction of the whole transaction is, that the equitable, if not legal, title to the mineral interest remains in defendant, and therefore the plaintiff cannot recover.

"3. That, even viewed as distinct instruments, the effect of the deed from the defendant to Orchard was not a sale within the true intent and meaning of the parol agreement, as testified to by plaintiff and his witnesses.

"4. That if a sale of the mineral interest was even agreed

to be effected for the joint benefit of plaintiff and defendant, such authority is confined to an execution within a reasonable time, and that two years was not a reasonable time, and that such agreement had ceased to be of effect on the first day of April, 1883.

"5. That the agreement, even according to plaintiff's testimony, is without consideration, and therefore the jury should respond to the first issue, No.

"6. That by the bonds for title, introduced by plaintiff and executed by defendant to Orchard, and by the assignment of said bonds by Orchard to Treloar, there was in equity a conveyance of all the mineral interest to Treloar, and the deed from defendant to Orchard, being made subsequent to the execution of these bonds, must be construed in the light of and in connection with the bonds."

And it appearing that these bonds for title were never surrendered by Treloar to the defendant, there was no estate in the mineral interest conveyed by the deed. Up to this time, then, the contract to sell the mineral interest is executory only, and there are no "proceeds of sale" of the mineral interest from which the plaintiff can recover.

All of which were refused by the court.

The defendant also asked the following instruction, which was given:—

"If the jury shall find from the testimony that the contract, if any, was that the defendant agreed to allow the plaintiff, Michael, to have half of the mineral interest itself in the land specified in the complaint, the jury should respond to the first issue, No."

The court then instructed the jury that, the burden of proof being on the plaintiff, they must be satisfied, by a preponderance of testimony, that the contract, if any, made by the defendant was as alleged, otherwise they should answer the first issue in the negative.

That as to the second issue, the burden was on the plaintiff to show that the defendant had made sale of the mineral interest and received the money therefor; that a sale of the land alone would not entitle the plaintiff to recover; that they might consider all of the evidence, including the bonds put in evidence, and say whether the defendant had sold the mineral interest and received the money therefor, and if so, what amount.

That as to the third issue, if they found the two first for the

plaintiff, he would be entitled to one half of the amount received by the defendant for the mineral interest, with interest from January 12, 1884.

Motion by defendant for new trial, for error in refusing instructions asked, and for admitting testimony objected to.

Motion denied, and appeal.

1. The first exception was to the admissibility of the testimony of Michael, to prove the agreement in parol, in regard to the proceeds of the sale of the mineral interest in the land.

The contract for the sale of the land was in writing,—the land itself was sold,—but the agreement that if the mineral interest in the land should be sold during the lifetime of the plaintiff, he should have one half of it, was not put in writing. If the contract of sale was made subject to this agreement, as an inducement to the contract, the agreement, though in parol, may be enforced. The agreement did not pass, or purport to pass, any interest in land, and does not fall within the statute of frauds.

In *Manning v. Jones*, Busb. 368, Jones contracted to sell Manning a tract of land at a stipulated price. It was, at the same time, agreed that the defendant, Jones, should repair the plantation and houses by a day named. The deed was executed and delivered to Manning, and, at the time of the delivery of the deed, Jones said he would have the repairs made by the time specified. Having failed to do so, the plaintiff brought an action to recover on the contract.

The court below held that parol evidence was inadmissible. Nash, C. J., said: "In this there is error. It is true, as a rule of evidence, that where a contract is reduced to writing, parol evidence cannot be received to contradict, add to, or explain it. The error consists in considering the evidence in this case as offered for either of these purposes. It was offered to set up another and distinct part of the contract, which never was reduced to writing; a contract which was ancillary to the main one, which was the sale and purchase of the land. . . . As soon as the deed was delivered . . . the title passed . . . unclogged with any conditions whatever; but it did not have the effect to discharge Jones from his obligation to put on the premises the agreed repairs. And as the contract was in parol, it might be proved by parol. Its existence added no new covenant to the deed, . . . nor did it contradict or explain any one that was contained in it. The

action is maintainable upon the contract as to the repairs made at the time the deed was delivered."

In *Trowbridge v. Wetherbee*, 11 Allen, 361, it is said that a parol promise to pay to another a portion of the profits made by a promisor on the purchase and sale of real estate is not within the statute of frauds, and may be proved by parol. See also *Sherrill v. Hagan*, 92 N. C. 345.

2. The second exception was to the evidence of Richards, in regard to the letter written by Foil to the plaintiff, but signed by Richards. It was competent as corroborating Michael, and also as tending to show the fact that Foil, after the deed from Michael to him, recognized the latter as interested in the sale of the mineral interest.

3. The defendant objected to the competency of Puryear, because he was an attorney, and "was in the employment either of himself, or the plaintiff and himself," and the conversation was, therefore, confidential and privileged.

It is not denied by the plaintiff that if Puryear had been counsel for the defendant alone, his testimony would have been incompetent; but it is insisted, and we think it so appears, that he was counsel for the plaintiff, who alone paid the fee; and if so, the communication was privileged only as to him, and could be removed by his consent: 1 Greenl. Ev., sec. 243.

But conceding that the witness was the attorney of both the plaintiff and defendant (there is nothing to show that he was the attorney for the defendant alone), as between the counsel and the plaintiff and the defendant, the matter was not, in its nature, private and confidential; it was common to all three, "and could, in no sense, be termed the subject of a confidential disclosure": 1 Greenl. Ev., sec. 244.

The learned counsel for the defendant says that if an attorney acts for several clients, he cannot testify without the consent of all, and for this he cites several authorities. This is undoubtedly true, as between his clients, or any one of them, and third parties; "but a communication made to counsel by two defendants is not privileged from disclosure in a subsequent suit between the two."

We are not aware that the question, in its present form, has ever been before the courts of this state, but in *Rice v. Rice*, 2 B. Mon. 417, referred to in Greenleaf, it was directly before the court, and after laying down the general rule that a legal adviser will not be permitted to disclose communications or information derived from clients, as such, it is said:—

"But does this rule apply in this case? Here the controversy is between the parties themselves, and the attorney is under the same obligations to both of them. The matter communicated was not, in its nature, private, as between these parties, who were both present at the time, and consequently, so far as they are concerned, it cannot, in any sense, be deemed the subject of a confidential communication made by one, which the duty of the attorney prohibited him from disclosing to the other. The reason of the rule has no application in such case. The statements of parties, made in the presence of each other, may be proved by their attorneys as well as by other persons, because such statements are not, in their nature, confidential, and cannot be regarded as privileged communications. The testimony of the attorney was, therefore, properly admitted in this case."

This reasoning seems to be sound, and so we say, in the present case, the testimony was properly admitted.

4. The fourth exception is to the refusal of the court to instruct the jury that the alleged agreement was void because not in writing. This exception cannot be sustained, for the reason assigned for overruling the first exception to the evidence. If it had been an agreement to sell any interest in the land, or if, as his honor charged, it was that the plaintiff should "have half the mineral interest itself in the land specified," it would have been otherwise.

5. Even if the two bonds be taken together, and construed as one transaction, his honor instructed the jury "that they might consider all of the evidence, including the bonds put in evidence, and say whether the defendant had sold the mineral interest, and received the money therefor; and if so, what amount." And this was a compliance with the plaintiff's prayer, as far as he was entitled to it. It was a correct enunciation of the law, as applicable to all facts as the jury should find from the evidence.

It is not the duty of the court to charge the jury upon a single selected fact, nor is he bound to give the charge in the language asked for: *Wilson v. White*, 80 N. C. 280; *Rencher v. Wynne*, 86 Id. 268; *State v. Boon*, 82 Id. 637; *Clements v. Rogers*, 95 Id. 248.

6. The refusal to give the third instruction, as asked for, is disposed of with the last.

7. The refusal to instruct the jury that, admitting the agreement, the sale must be effected within a reasonable

time, was not error. The doctrine of reasonable time applies when no time is specified.

When stated in the agreement, why should it be limited to a shorter time?

8. The sale and conveyance of the land constituted a consideration for the agreement: *Manning v. Jones, supra*; *Sherill v. Hagan, supra*.

This disposes of the exception to the refusal to give the fifth prayer.

9. The sixth prayer, for instruction to the jury, is disposed of, with the exception to the refusal to give the second and third. It was substantially given, as far as the defendant was entitled to it.

There is no error.

Affirmed.

AGREEMENT CONCERNING PROCEEDS RESULTING FROM SALE OF REALTY is not within provision of statute of frauds concerning contracts in regard to realty: *Bruce v. Hastings*, 41 Vt. 38; 98 Am. Dec. 592.

WHERE NO TIME IS SPECIFIED IN CONTRACT CONCERNING SALE OF LAND, doctrine of reasonable time applies: *Dark v. Johnston*, 55 Pa. St. 164; 93 Am. Dec. 732.

ATTORNEY IS NOT PERMITTED TO DISCLOSE CONFIDENTIAL COMMUNICATIONS OF CLIENT: *Gallagher v. Williamson*, 23 Cal. 331; 83 Am. Dec. 114.

COURT IS NOT BOUND TO INSTRUCT JURY UPON MERE ABSTRACT PROPOSITION: See *Stamors v. Shaw*, 68 Md. 11; *ante*, p. 412, and note.

COURT NEED NOT GIVE INSTRUCTION IN LANGUAGE OF REQUEST: See *Nesby v. Harrell*, 99 N. C. 149; *ante*, p. 503, and note.

COOK v. MOORE.

[100 NORTH CAROLINA, 294.]

COURT CANNOT AT A SUBSEQUENT TERM AMEND, MODIFY, OR SET ASIDE A REGULAR JUDGMENT, except upon an application to rehear, or because of accident, mistake, or inadvertence of the court, surprise, or excusable neglect, as provided by statute.

ENTRY WILL BE STRUCK FROM THE RECORDS, AND ERROR CORRECTED, where by inadvertence an order of affirmance is entered instead of an order of reversal.

R. B. Winborne, for the plaintiff.

R. B. Peebles, for the defendant.

MERRIMON, J. The plaintiff moved at the present term to strike from the records of this court an entry made by mistake, as suggested, that purports to be a judgment, in its

nature final here in this case, granted at October term of 1886, affirming the judgment of the court below, and to enter of record *nunc pro tunc* the judgment reversing that judgment which the court had determined upon, and intended to enter, but failed by inadvertence so to do.

It is not contended that this court can reverse, set aside, or modify in any material respect a regular, final judgment, at a term thereof subsequent to that at which it was entered. It is clear and well settled that it has no such authority, except upon an application to rehear, or because of "mistake, inadvertence, surprise, or excusable neglect," as may be allowed by statute: *Murphy v. Merritt*, 63 N. C. 502; *Mabry v. Erwin*, 78 Id. 45; *Moore v. Hinnant*, 90 Id. 163, and cases there cited; *Sibbald v. United States*, 12 Pet. 488; *Bank v. Moss*, 6 How. 81; *Bronson v. Schulten*, 104 U. S. 410.

It is just as well settled, however, that the court has authority upon application, or *ex mero motu*, at all times in term, and it is its duty, to amend and correct its records so as to make them speak the truth and be consistent, and to make proper entries *nunc pro tunc* that were certainly intended but omitted to be made by mistake, accident, or inadvertence of the court. Such authority is essential. Courts are not infallible; they, like all other earthly tribunals, are liable to make mistakes of fact that cannot be corrected in the ordinary course of procedure, and it would contravene every principle of reason and justice if they could not in some way correct them. The law contemplates that each court can itself the better, the more certainly and accurately, correct such its own mistakes than another court, whether appellate or not. But such power should be exercised with great care and caution, and only upon clear and satisfactory proof, because, when entries are made in the course of the business of the court, they are presumed to have been made upon careful consideration, and to be correct, and moreover, they import absolute verity while they are allowed to remain: *Farmer v. Willard*, 75 N. C. 401; *Wall v. Covington*, 83 Id. 144; *Scott v. Queen*, 95 Id. 340; *Strickland v. Strickland*, 95 Id. 471; *Brooks v. Stephens*, 100 Id. 297; *Matheson v. Grant*, 2 How. 263; *Sheppard v. Wilson*, 6 Id. 260; 2 Tidd's Practice, 932; 1 Williams on Executors, 762, 763; 3 Chitty's General Practice, 101.

The mere entry in writing on the minutes of the proceedings of the court from which the record is made up when need be does not itself constitute the judgment; it is only evi-

dence of it, and imports verity while it remains. But the judgment is the conclusion of the law as determined and applied by the court to the case before it, and it remains in the mind of the court until it shall be truly entered of record. When the conclusion of the law in a case is thus reached, the court cannot, after the term at which it was entered, interfere with it. At the end of the term, it passes beyond the control of the court. But the entry of record must embody and be what the court determined,—decided,—and what it intended should be so entered; otherwise the judgment will not have been entered of record, and the court may, at a subsequent term, enter it correctly *nunc pro tunc*. The court cannot, at a subsequent term, amend, modify, or interfere with a regular judgment regularly entered of record at a preceding term; it can correct, amend, or modify such a one improperly entered, or enter one which, through accident, mistake of fact, or inadvertence of the court was not properly entered, or not entered at the former term, when the court intended to enter and ought to have entered it.

In the case before us, it is manifest from the opinion of the court filed, prepared by the late Justice Ashe, that the court had determined, and it was its mind and purpose, to reverse the judgment of the court below, and grant a new trial, and to enter judgment accordingly. It also so appears from the memorandum made by the court at the time the case was decided in conference of the judges. The order of affirmance made at the foot of the opinion was a clear inadvertence of the court, and cannot be allowed to prejudice the plaintiff. Through such inadvertence of the court, its judgment was not entered, and it must be now.

The motion must be allowed, and it must be declared that there is error. The judgment of the court below must be reversed, and further proceedings had in the action there according to law. To that end, the clerk will certify this opinion, and the opinion of the court as delivered heretofore, except the memorandum at the foot thereof, to the superior court; and direct the clerk of the latter court to return to the office of the clerk of this court the certificate purporting to be the certificate of the judgment of this court.

It is so ordered.

AMENDMENT OF JUDGMENT AFTER TERM: See the note to *Bramlet v. Pickett*, 12 Am. Dec. 351-354; and see *Adams v. Requa*, 22 Fla. 250; 1 Am. St. Rep. 191, and note.

COURTS RARELY SET ASIDE JUDGMENT AFTER LAPSE OF TERM: See *Kemp v. Cook*, 18 Md. 130; 79 Am. Dec. 681; *Dorsey v. Kyle*, 30 Md. 512; 96 Am. Dec. 617.

VACATING JUDGMENT FOR SURPRISE, MISTAKE, OR EXCUSABLE NEGLIGENCE: See the note to *Burnham v. Hays*, 58 Am. Dec. 392-396; *Kemp v. Cook*, 18 Md. 130; 79 Am. Dec. 681.

CANNON v. WESTERN UNION TELEGRAPH COMPANY.

[100 NORTH CAROLINA, 300.]

CIPHER TELEGRAMS — DAMAGES. — It is but a reasonable requirement that the importance of a cipher message, and of its speedy as well as accurate transmission, should be made known to the receiving operator, if the company is to be held responsible for serious damages.

CONDITION THAT MESSAGE BE REPEATED. — If importance of telegram does not appear on its face, as in case of a cipher message, and a party chooses to send a single unrepeatable message, when at a small additional expense a mistake could be avoided, it should be at his own risk, in the absence of gross and inexcusable negligence on the part of the company and its servants.

TELEGRAM — MEASURE OF DAMAGES. — If it be assumed that analogy exists between carriers of goods and public carriers of messages as to responsibility, it by no means follows that the loss of a bargain made, or which might have been entered into, from which profit would have resulted, can be visited in damages upon a carrier uninformed of the purpose or importance of the communication.

John Devereux, Jr., for the respondents.

P. D. Walker, for the appellant.

SMITH, C. J. The plaintiffs, Cannon, Fetzer, and Wadsworth, cotton merchants, engaged in business at Concord, in this state, had entered into contracts with persons in New York to deliver to them respectively one hundred bales of cotton in December, 1879, and five hundred in February of the next year. In order to provide for fulfilling said contracts, in the forenoon of the third day of November preceding, they placed in the hands of the defendant's agent and operator a message, to be transmitted over the wires to Tannahill & Co., their agents in New York, in this form:—

"If market is firm and advancing, narrator."

At a later hour the same morning, about the hour 11:45, and after receiving a telegram giving the state of the market on that day, a second message was sent, containing the simple word "narrator," and omitting the prefacing conditions of the first. Neither of these dispatches had upon them any marks

indicating the hour at which they were delivered to the operator, but each was indorsed by the operator with the hour at which it was sent, showing the first to have been started at 11:15, A. M., and the next at 12:35, P. M.

There being no direct single telegraphic wire connecting these points, it was necessary to transmit such communications, when required, to what are denominated relay offices, where the message was received, and, by repeating, forwarded to its destination, one of them, used at Concord, being at Charlotte, and the other at Greensboro, and messages were sent indifferently by the one or the other, whichever, less pressed with other business, could most speedily forward them.

The first of these messages passed through the Charlotte office, and thence was sent on to Richmond, where it could not be immediately forwarded, in consequence of the bad working of the wires from atmospheric or other disturbing cause, and the consequent accumulation of business in the office, and suffered some delay, reaching New York at 1:20, P. M.

The later message, passing through and stopping at Greensboro, with the greater facilities afforded then by that route, arrived and was delivered three minutes earlier than the first.

There being nothing upon the face of either to show its priority in time, and the market not indicating a tendency to advance, the agents forbore to proceed, and did not carry out the instructions, exercising their judgment, as authorized in the first forwarded and last received dispatch.

The cipher code, as the book is designated, in which unexplained, and unmeaning without, words are used by the plaintiffs to convey directions, unintelligible to others than those who have learned it, contains, according to the testimony of one of the plaintiff firm, 180 pages, with about 20 ciphers on each, and 35 such on the page whereon the word "narrator" is found. The telegraph operator had before been in the plaintiffs' service, and seen the book, but, as he declared, when giving in his testimony, did not know its cipher import, nor understood the importance of the communication, though as the plaintiff J. W. Cannon, who handed in the first message at 9:30, A. M., swore that, in doing so, he informed the operator, W. H. Holt, of his wish for the prompt sending off of it, in order that it might reach New York, if possible, before the opening of the cotton market that day.

The dispatches reached that city, and were delivered to the agents, Tannahill & Co., one hour and a half before the closing of the cotton exchange, which is at three, P. M., and they were proceeding to make the purchases under the unconditional order, when they were stopped by the first order, the filling of which was dependent on the state of the market, which was not firm, and funds of the plaintiffs sufficient for the purpose in their hands.

On November 3d, cotton futures deliverable in December were selling at 11.01, and in February, at 11.27. The next day the exchange was not opened, it being a legal holiday, and on the fifth day of November the price had advanced for these deliveries, as it did further on the day succeeding, to 11.39 and 11.65, respectively.

The messages were sent on printed forms, in the upper part of which (and to this attention is called in a memorandum at the foot, in large capital type) is the following clause:—

“All messages taken by this company are subject to the following terms:—

“To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of the lines, or for errors in cipher or obscure messages.

“And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company, when necessary to reach its destination.”

Then follows a clause providing for insuring the correct transmission of the message over the lines of the company, at an additional charge of one per cent for one thousand miles or less, and two per cent for a greater distance.

It does not appear that the plaintiffs, by their agents or otherwise, made any contract for the purchase of cotton to meet their own future deliveries, at the enhanced or at any price,

and under the directions of the court the jury were allowed to estimate the damages at the difference in price in the article on the third and fifth days of the said month, the advance between those dates being found by the jury to be \$855 on the entire lot, with the liberty of allowing interest thereon, which the jury did give, at the rate of six per cent per annum. To this instruction, as well as to many others given, or refused when requested by defendant's counsel, exception was entered, which we do not find it necessary to examine, nor, indeed, to determine, the effect upon the defendant's liability for the alleged negligent delay in transmitting the message.

Without passing upon the question of the plaintiffs' own culpability in sending off a second so near the first message, without any intimation upon its face that a previous one had been sent, which the last was intended to modify, and with no allusion whatever to it,—a fact which seems to have caused the perplexity in the minds of the agents as to what ought to be done, and in consequence they did not act at all,—or upon the indifference of the agents themselves in not at once inquiring by telegraph the meaning of the conflicting communications, and regulating their conduct by the information thus obtained, we think it was but a reasonable requirement that the importance of the message, and of its speedy as well as accurate transmission, should have been known to the receiving operator, so as to stimulate his activity in forwarding it, in more distinct and direct terms than those testified to by the partner. The message itself speaks no certain sound, and conveys to the reader unacquainted with the new meanings affixed to words in the code no suggestion as to its real significance, as it did not, as the operator swears, to himself. This is but a reasonable requirement on the part of the company, and if the sender chooses to speak in unintelligible language to those who are to pass it over the wires, it is due to the company, if it is to be held responsible for serious damages, that the information of its importance should be given to the sending operator, in order that he may communicate it to an intervening agency employed in forwarding, and thereby diligence and care be secured from each. If the message be in the form of a proposal to buy or sell on certain terms, so that in case of concurring minds a contract would result, its importance would appear on its face; if not thus disclosed, and a party chooses to send a single unrepeatd message, liable to be misunderstood and erroneously conveyed in passing through other

offices, when at small additional expense the mistake could be avoided, it should be at his own risk, in the absence of gross and inexcusable negligence on the part of the company and its servants.

Such is the import of the ruling in *Lassiter v. Telegraph Co.*, 89 N. C. 334, where the plaintiff assumed the hazard of a single communication, and acted upon it.

There are decisions which hold an analogy between public carriers of goods and public carriers of messages, and put the same rigid responsibility upon each. The supposed analogy is repudiated by others, as a message transmitted has not a property value like goods, requiring safe custody and delivery.

But assuming some such similar relation to have been formed between them and the person employing their services, it by no means follows, in either case, that the loss of a bargain made, or which might have been entered into, from which profit would have resulted, can be visited in damages upon the carrier uninformed of the purpose or importance of the communication. Thus in *Horne v. Mid. R'y Co.*, L. R. 7 Com. P. 583, a case commented on in Wood's *Mayne on Damages*, section 34, page 40, the plaintiff had contracted to deliver a lot of shoes in London on February 3, 1871, intended for the use of the French army, and on delivering them to the company for transportation, he gave the information to the latter that the contract required a delivery on that day, but did not state the special nature of the contract. In consequence of the delay in the carriage, the contract could not be complied with, and the goods were refused. The market price had not varied between the day when the shoes were due and that on which they were received, but it was below the contract price, of which the company was ignorant. It was held that the company was not liable for this difference, it not having been advised of the special circumstances which led to the special loss.

And so in *Sanders v. Stuart*, L. R. 1 C. P. D. 326, noticed in the next section of that work, the rule was extended to a telegraph company. The plaintiffs intrusted the defendant with a message in cipher, to be sent by telegraph to America, which was not delivered, and the plaintiffs lost considerable profits in consequence, which otherwise would have been made. The message was unintelligible to the defendant, and so intended to be, giving him no clew as to the special loss that might result from his negligence. It was held that no more than

nominal damages could be recovered. But a more serious obstacle in the way of the plaintiffs' recovery of substantial damages is presented in the fact that they made no contract from which either profit or loss could come,—did not buy (the agents acting for them) at the advanced rates beyond what the cotton might have been bought for on the day of the reception of the messages, and for aught that the case shows, they might have bought at a subsequent time before they were required to deliver at the same or at a reduced rate. However this may be, no actual loss is proved to have been incurred, and the loss is merely of an opportunity of making a bargain, which would have been profitable had the goods been sold on the sixth day at the market price then prevailing. It is not shown that any loss was sustained upon the plaintiffs' contract from their being compelled to pay a higher price than that which ruled on the third.

But the very point now under consideration came before the supreme court of the United States at a recent term (*Western Union Tel. Co. v. Hall*, 124 U. S. 444), and the opinion of Mr. Justice Matthews is so full, and his reasoning so conclusive, that we are content to refer to it as a controlling authority, and decisive of the case before us.

The defendant in error, plaintiff in the court below, at 8, A. M., November 9, 1882, sent from Des Moines, Iowa, by the company's line of telegraph, a message, upon a similar form as ours, to Charles I. Hall, at Oil City, in Pennsylvania, as follows: "Buy ten thousand, if you think it safe. Wire me." The message was forwarded, and, from negligence and want of care, reached Oil City at 11, A. M., the same day, leaving out the name of the person to whom it was addressed. Had it been given, Hall would have received it at 11:30, and would have bought the petroleum meant in the message at \$1.17 per barrel, the market price.

When the name was ascertained, and the dispatch delivered to Hall, at 6, P. M., the exchange was closed, and at the opening next morning the price had advanced to \$1.35 per barrel; and in consequence, it being left to his judgment, Hall did not buy. The action was to recover the difference in price, to wit, eighteen cents per barrel.

After an elaborate examination, following a full and exhaustive argument, with a large number of cited cases, the court came to the conclusion that the plaintiff could only recover the cost of the transmitting the message. The court

say: "Of course, where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss, based upon changes in market value, are clearly within the rule for estimating damages." "Neither does it appear," the opinion proceeds to say, "that it was the purpose or intention of the sender of the message to purchase the oil in expectation of profit to be derived from an immediate resale."

Brought to the test of this ruling, it is plain that there have been sustained no damages for which the law will give redress upon the defendant beyond a nominal sum. Had the goods been bought on the day of receiving the message, it was not with a view to sell on the day when the price had risen, but to provide for existing engagements, and it does not appear that it could not have been bought on as favorable terms afterwards in time to fulfill those engagements; and if so, the loss would be of expected but uncertain profits.

The rule is thus stated in a note at page 242 (332) in Ewell's *Evans on Agency*: "In this country, the telegraph company is also liable [having referred to cases in which it is held that the liability is to the sender only in England] to the person to whom the message is transmitted, upon delivery thereof, in case of an error in transmission attributable to the fault of the company, "when the error is attended with damage to the person receiving it"; referring, in support of the proposition, to *Bigelow on Torts*, 277; *Bigelow's Leading Cases on Torts*, 619, 621; and several adjudged cases. Unquestionably, the same liability will arise when the damage results from an erroneous communication of the terms of a dispatch.

We have avoided an expression of opinion upon the numerous other exceptions taken at the trial, and will only repeat what was said in substance in *Lassiter v. Tel. Co.*, *supra*, in reference to the difficulties incident to a correct communication of intelligence over wires, and the reasonableness of a rule which, to insure entire accuracy, requires the message to be repeated: "The electric ticks to be given at one end of the line, and to be interpreted and read at the other, are not articulate sounds, like those of the human voice, and are much more liable to be misunderstood, and the individual handwriting of the sender himself, and his meaning, may be mis-

understood"; and again, quoting the words of Chief Justice Digelow: "The unforeseen derangement of electric apparatus; a breach in the line of communication at an intermediate point not immediately accessible, occasioned by accident or by wantonness, or by malice; the imperfection necessarily incident to the transmission of signs or sounds by electricity, which sometimes renders it difficult, if not impossible, to distinguish between words of like sound or orthography, but of different signification,—these, and other similar causes, the effect of which the highest degree of care could not prevent, make it impracticable to guard against errors and delays in sending messages to distant points."

These suggestions point strongly to the reasonableness of the requirement of a repeated message, by which, at an inconsiderable expense, the error in a dispatch would be avoided, and that the company's responsibility should be made to depend upon its observance, especially where the cipher form is adopted, which furnishes to the operator no means of ascertaining its import.

But for the errors pointed out the judgment must be reversed, and a new trial had in the court below.

Error.

Venire de novo.

TELEGRAPH COMPANY IS NOT LIABLE FOR LOSS CONSEQUENT ON FAILURE TO SEND CIPHER MESSAGE, and as purport of message is communicated to company: See *W. U. Tel. Co. v. Hyer*, 22 Fla. 637; 1 Am. St. Rep. 222, and note 230.

TELEGRAPH COMPANY MAY LIMIT ITS LIABILITY BY CONDITIONS REQUIRING REPETITION OF MESSAGE, provided, however, that it cannot stipulate against liability for its gross negligence: *W. U. Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795, and note.

MEASURE OF DAMAGES FOR INJURIES BY NEGLIGENCE in delivery of message by telegraph: See *Pegram v. W. U. Tel. Co.*, *ante*, p. 557.

FARRIOR v. HOUSTON.

[100 NORTH CAROLINA, 369.]

LEVY ON LAND IS UNNECESSARY WHEN THE JUDGMENT IS A LIEN THEREON.

And where land is sold under execution, it is only essential that the requirements of the law be observed, and that it be fully made known what property, describing it with sufficient certainty, is exposed to sale, and what the bidder who may purchase acquires.

RECITALS IN SHERIFF'S DEED as to his acts are *prima facie* evidence of the facts recited.

W. R. Allen, for the appellant.

H. R. Kornegay, for the respondent.

SMITH, C. J. When this cause was before the court upon the defendant's appeal from a ruling that, under the pleadings, and upon an averment of title to the land in themselves, they could not be heard to controvert that of the plaintiff by opposing evidence merely, the ruling was declared to be erroneous, the judgment reversed, and a new trial awarded: 95 N. C. 573.

Upon the last trial, the plaintiff, who claimed the property under one I. B. Kelly, exhibited in evidence an execution issued in the name of the said Kelly against the defendant, George E. Houston, and Edward W. Houston, Administrator, to Bland Wallace, sheriff of Duplin, under which, after a levy of the same, the premises claimed were sold and conveyed to said Kelly. The levy was indorsed thereon in these words:—

"Levied this execution upon George E. Houston's interest in 679 acres of land, more or less, in Kenansville township, adjoining the lands laid off to him as a homestead, and others.

"B. WALLACE, Sheriff."

It appeared from the testimony of one A. B. McGowen that 182 acres were assigned for the debtor's homestead, and that, outside of this tract, the said George B. Houston then owned 679 acres of land in Kenansville township, and no more, and that of these 679 acres, 353 acres adjoined the homestead, and 326 acres, that are now in controversy, do not adjoin the homestead, and are two miles distant from it.

The sheriff's deed is as follows:—

"STATE OF NORTH CAROLINA, }
DUPLIN COUNTY. }

"Know all men by these presents, that the undersigned, sheriff of the county of Duplin, and state above written, by virtue of an execution issued from the superior court of said county in the case following, to wit, in favor of Isaac B. Kelly against George E. Houston and Edward W. Houston, administrator with the will annexed of Calvin J. Houston, deceased, and other executions and *venditioni exponas*, as of record doth appear, having levied said execution or *feri facias* on the lands and tenements of the said George E. Houston hereinafter described, on the twentieth day of September, 1869,—said lands being in excess of his homestead, which had first been duly laid off,—and having made advertisement according to law,

and sold said lands and tenements at public sale, for cash, on the first Monday of November, 1869, at the court-house door in said county, when and where Isaac B. Kelly, of the county of Duplin and state of North Carolina, became last and highest bidder, at the sum of \$330, which said sum has been paid to the undersigned in accordance with the terms of said sale. In consideration of the premises, and in further consideration of the purchase-money paid as aforesaid by the said Isaac B. Kelly, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth bargain and sell, unto the said Isaac B. Kelly and his heirs, all the right, title, and interest of the said George E. Houston, as aforesaid, in and to the following tracts or parcels of land levied on as aforesaid, situate in Kenansville township, in said county of Duplin, and bounded as follows: First tract: Beginning at an ash in Dark Branch, and running S. 9 W. 44 poles to a pine at the road, same course continued to Neal's line; thence with his line N. 75 W. about 50 poles to a pine; thence with his other line S. 36½ W. 249 poles to a pine in the calf-pasture, N. 35½ W. 186 poles to a pine; thence N. 40 W. 40 poles to a pine; thence N. 14 W. about 96 poles to the run of Dark Branch; thence down the run to the beginning,—containing 326 acres, more or less. Second tract includes all the land devised by George E. Houston, Sen., to said G. E. Houston, except 182 acres set apart and allotted to him as a homestead, and is bounded as follows, viz.: Beginning at a pine near the colored people's church, on the public road,—McGowen's corner, formerly James Pearsall's,—and the beginning corner of said George E. Houston's homestead tract, and runs with McGowen's line to Dr. I. C. M. Loftin's corner; then with his line to John A. Bryan's, formerly Oliver's, corner; then with his line to the public road, west of the branch crossing the road; then along the road westerly to the foot of a cart-path at the turn of the road, the last corner of said G. E. Houston's homestead tract; then with his line to the beginning, supposed to contain — acres, more or less. To have and to hold said lands and premises, with all and singular the privileges, improvements, and appurtenances to the same belonging, to him, the said Isaac B. Kelly, his heirs and assigns, in as full and ample a manner as the undersigned is empowered by virtue of his office to convey and assure the same. And the undersigned, sheriff as aforesaid, doth covenant, promise, and agree to and with the said Isaac B. Kelly, his heirs and assigns, that

he and they shall and may, at all times hereafter, have, hold, occupy, use, and possess said lands and premises free and clear of and from all encumbrances had, made, or done by the undersigned, or by his order, means, or procurement; and that the undersigned will forever warrant and defend said lands and premises to the said Isaac B. Kelly, his heirs and assigns, so far as his said office of sheriff will authorize and enable him to do, and no further.

"In testimony whereof, the undersigned, sheriff aforesaid, hath hereunto set his hand and seal this third day of May, 1878.

BLAND WALLACE, Sheriff. [SEAL]

"Signed, sealed, and delivered in presence of

"R. W. HARGRAVE."

The court being of opinion that the plaintiff was not entitled to a verdict upon his proofs of title, and having so intimated, he submitted to a nonsuit and appealed.

The only question presented is, whether the alleged imperfect description of the land in the levy invalidates the subsequent proceeding to sell, and renders the sale and sheriff's deed void.

There have been numerous cases in which defects were alleged to exist in a levy upon land made under an execution from a justice of the peace, the imperfect description of the land being held to be too vague to warrant further proceedings for a sale.

The necessity of a reasonable certainty in ascertaining and identifying it grew out of the fact that the process, with the levy, were required to be returned to the county court where issued, and order made to the sheriff to sell the land so levied on. A levy was therefore a necessity in such cases, and of course the land must be sufficiently described to enable the sheriff, under the *venditioni exponas*, to know what he was to sell, and that bidders might understand what they were buying; and yet very imperfect descriptions have been upheld. Thus a levy "upon all the lands of the defendant lying on Queen's creek" was held to be fatally defective without evidence of identity, but a levy "upon all the lands of the defendant lying on the head waters of Ketchum's mill-pond, adjoining the lands of said Ketchum," was held to be sufficient to warrant the sale: *Huggins v. Ketchum*, 4 Dev. & B. 414.

Again, in *McLean v. Paul*, 5 Ired. 22, Ruffin, C. J., says that a constable's levy upon land in this form: "This day levied on the legal and equitable interest of Abraham Paul to 450

acres of land, more or less, in Robeson County, adjoining the lands of Giles S. McLean, Dugal McCallum, John McLean, and others,"—is not objectionable upon its face so as not to admit of proof of identity.

In *Judge v. Houston*, 12 Ired. 108, the sheriff, with a writ of *fiery facias* in his hands, indorsed on it: "Levied this execution upon the land of Stephen M. Houston on the east side of North East River, adjoining the lands of Stephen M. Grady and others, and, after due advertisement, sold the land levied on," etc. There were two tracts of land, on one of which the defendant lived, and had cultivated for several years in turpentine; the other, which did not adjoin the first, but was two miles from it. The defendant in the action, who was defendant in the execution, objected to the levy for its vagueness and uncertainty, and that it could not embrace the second tract, which did not touch the lands of Stephen M. Grady, as was conceded. In noting the objections, which were overruled in the superior court, and brought up for examination by the defendant's appeal, Pearson, J., uses this language: "The defendant's counsel did not advert to the difference between such a levy, which need not be returned, and the levy of a constable, which creates a lien, and must be returned, and must have a certain degree of particularity, so as to identify the land, and enable the sheriff to know which land to sell under the *venditioni exponas*, and of which notice must be given. It is not easy to perceive," he adds, "why a levy is required when the land is sold under the *fi. fa.*"

Still less reason exists for a levy upon land under the new practice, by which the command of the writ, in the nature of a *venditioni exponas*, is to sell, in the absence of any personal estate which can be seized by the officer, the real property belonging to the debtor when the judgment was docketed in the county or acquired by him thereafter: Code, sec. 448, par. 1.

Accordingly, in answer to an exception to the absence of any levy, this court say: "There would seem to be little, if any, advantage, and certainly no necessity, for making a levy on the real property of the debtor under the present system of practice, which makes a lien, etc. . . . The only effect of a previous levy is, the specific appropriation of the property on which it is made, out of other equally liable to the plaintiff's debt, and may confer an equity on others to have the property first levied on sold and exhausted before resorting to the other real property of the debtor": *Surratt v. Crawford*, 87 N. C.

372; and the proposition is reiterated in *Barnes v. Hyatt*, decided at the same term, and reported at page 315. All that is essential is, that the requirements of the law be observed, and that it be fully made known what property—describing it with sufficient certainty—is exposed to sale, and what the bidder who may purchase acquires. The sheriff's deed, whose recitals as to his own acts are *prima facie* evidence of the facts recited, expressly declares that the sale was made on the day and at the place specified by law of the lands and tenements of the said George B. Houston, levied and "hereinafter described," and the boundaries of each tract are definitely set out in the deed: *McKee v. Lineberger*, 87 N. C. 181; *Miller v. Miller*, 89 Id. 402.

We must therefore declare there is error, and reverse the judgment; and it is so ordered.

NECESSITY OF LEVY TO SUSTAIN SALE ON EXECUTION: See *Freeman on Executions*, sec. 280; note to *Waters v. Dwall*, 33 Am. Dec. 697-699; *Folsom v. Carl*, 5 Minn. 333; 80 Am. Dec. 429.

RECITALS IN SHERIFFS' DEEDS ARE EVIDENCE OF FACTS RECITED: *Beane v. Roberson*, 92 Mo. 192; 1 Am. St. Rep. 701, and note; and are conclusive: *Freeman on Executions*, sec. 334.

TURRENTINE v. WILMINGTON AND WELDON RAILROAD COMPANY.

[100 NORTH CAROLINA, 373.]

BAILER—DEGREE OF CARE.—WAREHOUSEMAN HOLDING GOODS OF ANOTHER AT HIS REQUEST AND WITHOUT PROFIT is not, in case of imminent danger from fire to warehouse in which they are stored together with other goods, bound to act upon the suggestion of the owner as to the best means of saving the goods. If an honest and reasonable effort is made in good faith by the warehouseman and his servants, suggested at the time as the best line of action to be pursued, it exonerates him from liability for loss, although it subsequently appears that a different course would have been better.

D. L. Russell and T. R. Purnell, for the appellant.

George Davis, for the respondent.

SMITH, C. J. This action is prosecuted to recover in damages the value of a lot of hams and bacon transported over the defendant's road to its terminus, the point of delivery, at Wilmington, in this state, which, while in the warehouse of the company, were, on the twenty-first day of February, 1886,

destroyed by fire. The complaint attributes the loss to the negligence of the company, and its failure to make proper efforts for the safety of the goods, or to allow the plaintiff himself to remove them to a place beyond the reach of the advancing flames. The defendant denies the imputation of negligence and want of due care and diligence in an effort for their preservation; and the issue drawn from the conflicting averments contained in the pleadings and put in form and passed on by the jury was as follows:—

Were the goods lost or destroyed by the wrongful act or default of defendant? Answer. No.

It was admitted at the trial that on Sunday the twenty-first day of February, 1886, the defendant (the carriage over the road being completed) had in its possession as warehouseman the goods whose loss is the subject of the suit, whereof the hams had been therein stored for seven or eight days, and the bacon, received latter, for two days; that the plaintiff knew of the arrival of the goods, and of their deposit in the warehouse, and he had given directions for their delivery when called for, having paid the freight charges thereon; that the warehouse was consumed, with a large amount of goods, besides those of the plaintiff, by an accidental fire that originated elsewhere, on the premises of others, some distance away, and that in its progress, and before reaching the warehouse, many buildings and much property were burned; that the fire occurred in the afternoon of the day mentioned, and caught the Champion compress, which was burning from a half to an hour, according to differing witnesses as to the time, from which due north was located the warehouse, and that a strong wind was then blowing from the southwest to the northeast. With these concessions, the testimony bearing upon the question of the defendant's negligence and responsibility for the loss was as follows:—

The plaintiff, whose evidence alone on his own behalf is given in the case upon this point, testified that while the compress was on fire, and a half or three quarters of an hour before the warehouse caught, he saw Captain Divine, the general superintendent of company, and said to him: "If you will open the doors of the warehouse, all the goods can be saved"; that Divine refused to open the doors, saying there was no danger, that the warehouse was fire-proof, and if the doors were opened, more goods would be stolen than saved; that, shortly after, he saw Mr. Bridgers, the president of de-

fendant, and said to him that if the doors were opened, the goods could be saved. Mr. Bridgers replied that the warehouse was fire-proof; to which plaintiff said: "Fire-proof, hell, with wooden doors"; Bridgers said: "You had better see Divine"; plaintiff replied, he had seen Divine, who had refused to open the doors; Bridgers then said: "Oh for a head for this concern!" That he could have saved everything in the warehouse if the doors had been opened; that the fire was a large conflagration, and burned up a large portion of the city. There was great excitement, and a large number of people of all classes were about the fire, and all very much excited. It was the custom for the railroad company to allow goods to remain in the warehouse after payment of the freight, without charge for storage, to suit the convenience of the consignees to take them away, and the goods sued for were left in warehouse under that custom. When the warehouse was crowded, and they wanted room, they would notify us to move the goods. This was done for convenience of consignees. That the warehouse was a pretty substantial brick one, with slate roof and wooden doors. That there was always danger at fires of goods being stolen; generally the case at large fires that a crowd gathers to plunder.

It was also in evidence, on the part of the plaintiff, that the officers of the defendant did not permit the warehouse to be opened until the warehouse of the W., C., & A. R. R., the building next to the defendant's warehouse, had been so far consumed that its roof had fallen in; that then the locks of the doors were broken, the doors opened, and a considerable amount of goods saved by removing them from the warehouse; that Superintendent Divine, when requested by plaintiff to open the doors, gave as his reason for refusing that the warehouse was in no danger, and that the goods would be stolen.

R. R. Bridgers, for defendant, testified that he had no recollection of the plaintiff having had the conversation with him as testified to by the plaintiff; that he was very sure he would have remembered such a conversation if it had taken place.

James F. Post, for defendant, testified that he was in the employ of defendant at the time of the fire as transfer agent; that the space between the W., C., & A. R. R. warehouse and the warehouse of defendant was full of cars; there were over 150 cars there, most of them full of very valuable merchan-

dise; that the bridge over the river at Hilton, on the W., C., & A. R. R., had broken down, and trains could n't pass; there were four trains, at least, delayed here, and all these cars were between the two warehouses; there was a car-load of powder, some six thousand or eight thousand pounds, that came in Saturday night before the fire, on the track between the two warehouses, about midway the train; the employees of the defendant were all absent, it being Sunday, and we had no engine fired up; I went to work as soon as I got there to get the powder out; if it had been left there, there would have been great damage to life, probably fifty persons would have been killed; I got an engine fired up, and went to work, before the compress caught, to clear the track, and hauled the powder out of the city; the greater part of the railroad's accommodation to move freight was there between the two warehouses, fully 150 cars; these cars were filled with cotton, naval stores, and valuable merchandise; the spring goods were then going south, and goods of immense value were in these cars; the cars belonged to defendant, and were worth over four hundred dollars apiece; all these cars were in much greater danger than the warehouse, because they would have burned before the warehouse; it was necessary to remove these cars to save the warehouse.

Harry Walters, for defendant, testified that he was general manager of the Atlantic Coast Line; when he got to the fire it had not reached the compress; the offices of defendant were directly east of compress, and warehouse directly north; the wind was blowing strong from southwest to northeast; the offices were burned, and many of the records of the company; he went below from the offices and saw fire-engine, — the water had given out, — and tried to get it to go down to the river to put the hose in, but they refused; there were a large number of cars between the W., C., & A. R. R. warehouse and the warehouse of defendant; I went there and saw that if we could get the cars out, we could save the warehouse; if we could get these cars out, there would be no danger; we got all the cars out but a few; the lines became so blocked with cars we could not get an engine down; got all the hands we could, and went to pushing the cars out by hand; we got all past the warehouse but one car, which we pushed up to the end of warehouse, but we couldn't push it any further; then I ordered the locks to be broken, and the doors to be opened; we did not have the keys to the doors; the warehouse caught

from that one car, and if it could have been moved out, the warehouse would have escaped; the wind was blowing obliquely across, and fire only struck the east end of warehouse; that car was at east end of warehouse, and set fire to it; we saved about six thousand dollars of goods by moving them away on lighters, and paid out a large amount for lighters and labor in saving the goods; the instant we saw we could not save the warehouse we broke open the doors; there is generally a large accumulation of freight on Sunday, and at that time Hilton bridge was broken down, and five or six trains delayed here; there was a very large amount of goods in the warehouses and cars; the offices and records burned before the warehouse; we could not concentrate all attention at any one point; we used all the means at our command; the offices, the warehouses, the passenger-sheds, machine-shops, cars, etc., of the defendant were all in jeopardy from the fire at the same time; there was about one hundred and twenty-five thousand dollars of goods in the cars between the two warehouses, and including the two warehouses and the cars, about one hundred and seventy-five thousand dollars or two hundred thousand dollars; the defendant had property in danger from the fire worth about five hundred thousand dollars. I did not open the doors of the warehouse sooner, for two reasons: I did not think it was in danger, and the goods would have been stolen.

John F. Divine, for defendant, testified: I was general superintendent of defendant at time of fire; there was a heavy wind, and fire made way rapidly; we had a large amount of freight accumulated here at the time; there were from 150 to 200 cars on the tracks between the two warehouses; we got all the cars out except a few next to the defendant's warehouse; got hands and pushed these out, all but one or two; the warehouse caught from this car; if this car could have been pushed out of the way, the warehouse would not have burned; I gave my whole attention to moving out these cars, as the best means of saving the warehouse; there was a quantity of powder in one of the cars, but don't know how much; as soon as I thought the warehouse was in danger, I broke locks of the doors and opened them; the wind was blowing towards the east end of warehouse, and it caught there; after the doors were opened, we got out all the goods we possibly could, and saved them by means of lighters; I had no conversation with the plaintiff on that day as testified to by him.

Mr. Meares testified that during the fire he saw persons running, and heard them say that there was powder there.

During the examination in chief of the plaintiff, his counsel proposed to prove by him the facts submitted in the following questions, which he propounded to the witness: "Were not the people at the fire saying that the warehouse would burn, and was not that the general belief of the by-standers?" The defendant objected, and the objection was sustained. The plaintiff excepted.

The plaintiff proposed to prove by another witness that the defendant has settled the claims of other parties whose goods were lost at the same fire, and under similar circumstances. The defendant objected; the objection was sustained, and the plaintiff excepted.

The plaintiff prayed the following instructions:—

1. Defendant, being custodian of plaintiff's goods, was bound to exercise such care and diligence in saving them as a person of ordinary prudence would exercise with reference to his own property: *Neal v. Railroad*, 8 Jones, 482.

2. If defendant refused or failed to open the warehouse, and attempt to save the goods, or permit them to be saved, when the warehouse was in danger, the fire threatening, and there was good reason to apprehend destruction, it was guilty of gross negligence, and the first issue must be found in the affirmative.

3. If, when the compass was burning, there was a high wind blowing in the general direction of the warehouse, it was negligence for the defendant to refuse to try to save the goods, or permit them to be saved, and the first issue must be found in the affirmative.

4. If, when the fire was raging, the circumstances were such as to cause a person of ordinary prudence to believe that the warehouse would burn, or was in danger of burning, it was the defendant's duty to try to save the goods, and its failure to do so, until the other warehouse was burning, was negligence, and the first issue must be found in the affirmative.

5. If the defendant refused or failed to try to save the goods as soon as it could be seen that they were in danger from the approaching fire, it was gross negligence, and the first issue must be found in the affirmative.

6. To establish gross negligence on the part of the defendant, it is not incumbent on the plaintiff to show any fraudu-

lent purpose or conduct: Jones on Bailments, 21, note; 2 Parsons on Contracts, 88.

7. If the defendant was guilty of negligence, it is not exonerated by reason of the fact that its own goods were in the warehouse with the plaintiff's: 2 Parsons on Contracts, 91, and note.

8. Even though there was reason to apprehend that opening the warehouse would result in confusing goods, miscarriage in delivery, or theft, this did not excuse defendant for its refusal to permit plaintiff to save his goods, if plaintiff demanded them.

The first, sixth, and seventh were given as prayed for. The others were not given as asked; but, after stating the case, the court charged the jury as follows:—

It is conceded by the plaintiff that the defendant is not liable as a common carrier, but he contends it is liable as a warehouseman. That the defendant was a warehouseman is conceded; and the question is, whether the defendant is liable for the loss of the goods, occasioned by what is conceded to have been an accidental fire, originating elsewhere than on defendant's premises, and without any fault on its part. If the jury believe that the goods were stored by defendant in a brick warehouse with slate roof, which was its usual place for the storage of its freight not taken away by consignees; that the fire was accidental, originating on the premises of others; that when the defendant's property was threatened with danger by the fire the defendant exerted all the means in its power to save the warehouse, by removing the alleged intervening box-bars, and the alleged car-load of powder, and other efforts, and by these means decreasing the danger of the said warehouse, and notwithstanding these efforts the warehouse and goods were destroyed,—then, nothing further appearing, the defendant is not liable.

The plaintiff denies that the defendant used all the means in its power. First, he says that if the doors of the warehouse had been opened the goods could have been saved, and that there was sufficient force present to have saved them. The court charges you that the defendant was not bound to act upon the suggestion or offers of by-standers as to the particular manner in which it should endeavor to save its property, or that which is under its control, but that it is its duty to avail itself of all the means within its reach to save such property; and upon this question the jury may consider the alleged offer of

assistance, the opportunity of employing force, and all the circumstances in evidence, and if, at the time when danger threatened the warehouse, the defendant had the means at hand, and could by their employment have saved the goods in the warehouse, the defendant failed or refused to employ these means, it would be liable. But if the jury believe that the fire was raging, and many buildings in different parts of the city were in flames; that there was a heavy wind blowing from the southwest to northeast; that the warehouse was due north of the compress; that a large number of persons of all classes and conditions were gathered together in the vicinity of the warehouse, and that there was danger of theft; that a car loaded with a large quantity of powder was blocked in on the track near the warehouse, with a number of cars in front of it; that the fire was on Sunday, when all of the employees of the defendant were off duty and away; that there was a large quantity of very valuable freight in the cars and the warehouse; that many cars—one hundred and fifty in number—were standing on the track between the two warehouses; that the efforts of the superintendent and manager were principally directed in removing the powder first, and then the cars; that these were near to the fire, and in greater danger than the warehouse in which were stored the plaintiff's goods; that several buildings of the defendant, including its offices, containing all of its records, at different points, were on fire, and that property to the value of about five hundred thousand dollars, belonging to the defendant and under its charge, was in danger and threatened by the fire; and if the jury further believe that, by reason of these alleged circumstances, all of the available force at the defendant's command was being used to move the intervening cars and powder, and in other efforts to remove inflammable matter between the fire and warehouse, and that by throwing open the doors of the warehouse the goods therein would have been exposed to a promiscuous crowd and in danger of theft,—then the defendant would not be guilty in failing to open the doors of the warehouse.

The plaintiff contends that, without regard to this, he is entitled to recover, because, after danger threatened, he requested the defendant to open the doors of its warehouse in order that he might remove his goods. This request is denied, and the burden of proof is on the plaintiff to show that he made such request. If you find there was such a request, then the court

charges that it was the duty of persons having freight in such warehouse to apply for its delivery during business hours and on business days (counsel conceded at this stage of the charge that the demand, if any, was made on Sunday, and that Sunday was not a proper day for the delivery of freight by defendant in the ordinary course of business); and if, when such demand was made to open the doors, all of the available force of defendant was engaged in protecting its property and that of others in its custody which was in more imminent danger, and that under the circumstances it had not the proper force to make a safe delivery of the plaintiff's property in the warehouse, and that opening or breaking open the doors, the key not being there, it is alleged, and allowing the plaintiff to remove his goods, would have exposed a large amount of goods in said warehouse to theft or miscarriage, and defendant was in good faith using all of its available means in protecting property in more imminent danger; that the fire was raging, and many buildings in different parts of the city were in flames; that there was a heavy wind blowing from the southwest to the northeast; that the warehouse was due north of the compress; that a large number of persons of all classes and conditions were gathered together in the vicinity of the warehouse, and that there was danger of theft; that a car loaded with a large quantity of powder was blocked in on the track near the warehouse, with a number of cars in front of it; that the fire was on Sunday, when all of the employees of the defendant were off duty and away; that there was a large quantity of very valuable freight in the cars and the warehouse; that many cars—one hundred and fifty in number—were standing on the track between the two warehouses; that the efforts of the superintendent and manager were principally directed in removing the powder first, and then the cars; that these were nearer to the fire and in greater danger than the warehouse in which were stored the plaintiff's goods; that several buildings of the defendant, including its offices, containing all of its records, at different points, were on fire, and that property to the value of about five hundred thousand dollars, belonging to the defendant and under its charge, was in danger and threatened by the fire; and if the jury further believe that, by reason of these alleged circumstances, all of the available force at the defendant's command was being used to move the intervening cars and powder, and in other efforts to remove inflammable matter between the fire and the warehouse,—then

the defendant was under no obligation to open its doors to the plaintiff.

But if, under the circumstances, you believe that the defendant had the means to have safely delivered to the plaintiff his goods, or that opening the door and permitting him to receive the same would not, under the circumstances, have probably exposed the other property stored in the warehouse to theft, then the defendant is liable.

There was a verdict in favor of the defendant, and the plaintiff moved for a new trial: 1. Because of the exclusion of testimony,—see exceptions; 2. Because of the refusal of the court to give instructions as asked; 3. Because of errors in the charge as given.

The motion was overruled, and judgment rendered in favor of the defendant. The plaintiff appealed.

The aspect of the case, pressed with most earnestness in the argument here, grows out of the fact that the plaintiff, at a time when the goods could have been removed with safety, was not allowed to enter the warehouse and take possession of his own for that purpose; and it is assigned as error that the instruction numbered 2 in those requested by the plaintiff to be given to the jury was refused. The others following, and denied, are substantially embodied in that, and need not be separately considered. In place of these, the charge of the court is fully set out, and seems to us to more fairly present the merits of the controversy, as developed in the evidence, to the minds of the jury. The law is there laid down, both carefully and with much accuracy, well calculated to aid and guide the jury to a just verdict. It certainly does not necessarily follow that a want of due regard to the rights and interests of the plaintiff is manifested in the refusal, at the time of the conflagration, under the attendant circumstances, when it was hoped the efforts then made to stay the progress of the fire would be successful, and the warehouse and what it contained be saved, to throw open its doors and expose them to increased hazard from entering sparks and depredation of others. The defendant owed no less a duty to others than to the plaintiff, and its efforts, with all the forces at command, seemed to have been directed to the preservation of all the goods in its custody.

The plaintiff was present to look after his, but other owners were not there; and it was not an unreasonable apprehension that opening the house and giving indiscriminate access to

the goods therein deposited would result in a much greater loss.

There were, moreover, as is proved, a large number of cars blocking up the way,—150 or more,—and a large quantity of gunpowder in some of them, and the efforts of the men, under the direction of the officers, were mainly made to remove them, so that the flame passing along them might be arrested before reaching the warehouse, and this was wellnigh accomplished, only one or two left, which it was found impracticable to move in time, and through these the fire was communicated to the warehouse. According to the superintendent, if the cars could have been removed, the warehouse would not have been burned. It is unnecessary to repeat the testimony as it is set out in full, but it tends to show energetic and well-directed efforts to save the large property of others in its hands and its own from the spreading and consuming element that was devouring houses all around, and we do not see any error in the charge of the court in regard to its responsibility. It must not be forgotten that one's judgment under such trying circumstances is not as calm and deliberate in determining what then ought to be done as afterwards upon a retrospect would have promised better results, and this severe rule of liability does not rest upon the custodian of another's property. If an honest and reasonable effort is made, suggested, at the time, as the best line of action to be pursued, and this in good faith, and of this the peril to the defendant's property gives full assurance, it exonerates from liability for loss. The warehouse, built of brick, and its roof slate-covered, seems to have been deemed wellnigh fire-proof; and even now, in reviewing the past, it is not clear that the plaintiff should have been permitted to take away his goods, and thereby endanger, if not insure the destruction of, the other goods; and if it were otherwise, and that the servants of the company erred in their action, it could hardly be imputed as negligence in them to so act upon an honest, though it may turn out to be a mistaken, judgment.

But the law is so fairly left to the jury in the charge that nothing is required of us in support of its correctness. But little aid can assuredly be derived from adjudged cases, as the facts are seldom, if ever, the same, and the question of culpable neglect must in each case depend upon its own facts. It must be declared that there is no error, and the judgment is affirmed.

WAREHOUSEMEN, DUTIES AND LIABILITIES GENERALLY: See the extended note to *Schmidt v. Blood*, 24 Am. Dec. 145-160; and see particularly, as to liability for loss by fire, *Id.* 155, and *Aldrich v. Boston etc. W. Co.*, 100 Mass. 31; 97 Am. Dec. 74; 1 Am. Rep. 76.

STATE v. HORTON.

[100 NORTH CAROLINA, 442.]

REQUEST FOR INSTRUCTIONS may, under the North Carolina code, section 415, be disregarded by the judge, where they are not put in writing and signed.

SEDUCTION UNDER PROMISE OF MARRIAGE. — INSTRUCTION that there was no evidence to go to the jury in support of an indictment for seduction under promise of marriage may properly be refused, where there is evidence that a child was born to the prosecutrix, that it resembled the accused, that he admitted the promise of marriage, but said it was only made as a piece of "devilment," and the virtuous character of the prosecutrix is conceded.

EVIDENCE. — UPON TRIAL OF ACCUSED FOR SEDUCTION UNDER PROMISE OF MARRIAGE, CHILD MAY BE SHOWN TO THE JURY to enable them to trace resemblance to alleged father, and they may take into consideration its appearance for that purpose.

INSTRUCTION is not made erroneous by the insertion by the court of the single word "from" between the words "believe" and "the" in a requested charge commencing, "If the jury believe the testimony of," this being the only modification or change made; it is the province of the jury to interpret and say what is proved by the witnesses.

CONSENT, IF SEDUCTION BE PROVED, IS NO DEFENSE to an indictment under the North Carolina statute (Acts 1885, c. 248) for seduction under promise of marriage. The statute plainly contemplates a seduction brought about by means of a promise of marriage in the nature of a deceit.

Attorney-General, and Theodore F. Klutz, for the state.

R. F. Armfield and L. S. Overman, for the defendant.

SMITH, C. J. The defendant is charged with violating the act of March 6, 1885, chapter 248, which is in these words:—

"That any man who shall seduce an innocent and virtuous woman under promise of marriage shall be guilty of a crime, and upon conviction thereof shall be fined or imprisoned, at the discretion of the court, and may be imprisoned in the penitentiary not exceeding the term of five years; provided, however, that the unsupported testimony of the woman shall not be sufficient to convict; provided, further, that marriage between the parties shall be a bar to further prosecution under this act."

The indictment, pursuing substantially the terms of the enactment, charges that the defendant, at the time and place mentioned, "did unlawfully, willfully, and feloniously seduce one J. S. Wilkerson, an innocent and virtuous woman, under the promise of marriage, against," etc., and the accused, being tried upon his plea of not guilty, was convicted by the jury. The testimony before the jury was to this effect:—

The prosecutrix testified that she was twenty-eight years of age, and was living with her father, as she had lived with him during her whole life, except when she was with a married sister, Mrs. Barnhardt, taking care of her small children, during which interval, about two years since September last, she first met and formed the defendant's acquaintance; that in about two weeks afterwards she met him again, and at his first visit to her an engagement to marry was entered into, to wit, on February 24th, and the marriage was to come in the spring following; that witness was to go to the house of Goodman, another married sister, and thence with the defendant proceed to Statesville and be married, and that she carried her clothes to the place in order to carry the agreement into effect, but defendant failed to come; that in January or February, 1887, after the arrangement, she first submitted to his embraces, and they had sexual connection; that this was accomplished in a room at night, no one else there, though her parents were in an adjoining room, while witness was sitting in a chair, and he, at the time, saying there was no harm in it, as they were engaged.

On cross-examination, she stated that the defendant was upon his knees, with one hand over her mouth, and the other around her person; that it occurred twice in the same way, and in each case against her will, and she was told by him to keep it a secret; that a child was born, the result of their intercourse, about the 1st of October, and he was the father, as she had "never had anything to do with any other man at any time in her life"; that his visits to her were about every two weeks for some two months, and afterwards he came to her father's house for several weeks.

The corroborative evidence offered by the state was, in general terms, as follows:—

The justice of the peace, who issued the warrant, detailed a similar statement of facts made to him as to the marriage agreement,—the time when made and to be performed, and the time and manner of the seduction.

The additional supporting evidence under the statutory requirements was this:—

John S. Wilkerson, the father of the prosecutrix, swore that the defendant came to his yard on the first Sunday in May, at sun-down; would not come into the house, but called witness out, as he said he wished to have some private talk with him; said he had heard that I was mad with him, and witness answered: "Horton, you know what is the matter; Sarah has caught cold, or is in the family way." Defendant replied he knew what would relieve her; that he had learned it from a young doctor, and witness need not tell any one. He then gave the prescription, and "admitted having promised to marry Sarah, but said he did it out of devilment, as many other young men."

The prosecutrix was supported in her testimony about going to the house by the latter, and her purpose in so doing.

The child was then exhibited to the jury by Mrs. Yost, who testified to her knowing the defendant, and the resemblance it bore to him.

To the introduction of the child before the jury defendant's counsel objected; but the objection was overruled, the court telling the jury that the resemblance was not evidence of a promise of marriage, and seduction following it, but was merely corroborative of the fact of sexual connection between the parties, and thus only to be considered by them.

The defendant, examined on his own behalf, denied that he had ever promised to marry the prosecutrix, or had sexual intercourse with her; admitted being at her father's house at the time stated by her, and remaining in the room after the father had gone to bed, the door not being shut; his visit to the latter in May; but he did not say he had agreed to marry his daughter.

The general character of the prosecutrix was admitted by the defendant to be good.

Defendant's counsel verbally asked a ruling that there was no evidence to go to the jury in support of the charge contained in the indictment. Under the rules of practice, this request was disregarded.

Written instructions were then asked, as follows:—

If the jury believe the testimony of Sarah Wilkerson, that the defendant accomplished his purpose upon her person by force, he having one hand upon her mouth to keep her from crying out, and the other around her body while sitting in the

chair, and all the time resisting, and she never consenting to the intercourse, defendant is not guilty.

The instruction was given with a single change in the insertion of the word "from" between the words "believe" and "the testimony," in the first line, and this addition: "If the defendant committed a rape, he cannot be guilty of seduction; but you are the judges of the testimony, and will give just such weight to each part as you think it deserves, and upon the whole evidence say how the truth of the matter is. If she was seduced, or made only a slight resistance and then consented, relying on defendant's promise of marriage, and was an innocent woman, the defendant would be guilty. If there was no sexual intercourse, or if it was brought about by force, or she was not an innocent woman, in either of the cases he would not be guilty. The burden of proof is on the state to satisfy the jury beyond a reasonable doubt: 1. That the defendant procured the carnal intercourse; 2. That he did so under a promise of marriage; and 3. That she was an innocent woman. By the words an "innocent woman," the law means a woman who has never had previous illicit intercourse with any man. If the jury are satisfied of these three facts beyond a reasonable doubt, they will find a verdict of guilty; if not so satisfied beyond a reasonable doubt as to any one of them, the verdict should be an acquittal."

The jury were the sole judges of the evidence and the credit to be given to it, the court having no right to intimate any opinion as to the fact. The defendant was convicted, and after the denial of the motion for a new trial upon the errors assigned, and noted in the record and judgment pronounced on the verdict, the defendant appealed.

This somewhat extended rehearsal of the evidence and of the charge is deemed necessary to an intelligent presentation of the alleged errors upon which we are requested to pass.

1. The refusal to give the unwritten charge. It is expressly provided in the code, section 15, that instructions requested shall be put in writing and signed, and if not, "the judge may disregard them." This was the course pursued, and the counsel had opportunity to put the proposed charge in writing, and remove this impediment out of the way. But if it be supposed that the statute applies not to criminal but to civil suits only, there is no error in the refusal to give the instructions demanded.

There was evidence, not only that coming from the prose-

cutrix only, but from other sources in support of hers, and that in all of the essential particulars constituting the offense defined in the act. The birth of the babe proved the intercourse with some one, and its features and general appearance point to its paternity.

The defendant admitted his promise to make her his wife, and his denomination of his conduct as a piece of "devilment," such as many young men practice, is an implication, at least, that he had effected his purpose by means of the promise.

The virtuous character and conduct of the prosecutrix was proved and conceded, so the testimony of the injured was not "unsupported," but derived confirmation from that of others, as the statute prescribes.

2. The second exception is to the exhibition of the person of the child for the jury to see, and trace any likeness it bore to the defendant.

This precise objection was made to the court's telling the jury "that they could take into consideration the appearance of the child, and give it whatever weight it thought it entitled to," in *State v. Woodruff*, 67 N. C. 89, and this court declared that there was no error in this part of the charge. This was said in a bastardy proceeding upon a question of paternity, and upon the same issue the child was introduced in this case.

3. The last exception is to the modification of the instruction given at the instance of the accused, and in one view is entirely groundless. It is the province of the jury to interpret and say what is proved by the witnesses, and this is the result of the interpolation of the preposition "from," nor was the law incorrectly laid down in what follows.

The statute plainly contemplates a seduction, brought about by means of a promise of marriage, in the nature of a deceit. The testimony fully warrants this inference, for the defendant induces assent by what he said about their contract relations, and his statement to the father that this was resorted to to overcome her reluctance as a chaste and upright maiden: 2 Wharton's Criminal Law, secs. 2073, 2678 a. Consent, too, if seduction be proved, is no defense, nor that natural unwillingness a virtuous woman feels against such self-abasement of which he speaks, when in fact it at last yields to the importunity of one expected soon to be a husband.

The court satisfactorily presented the case to the jury in this aspect of it, and no just grounds of complaint are furnished to the accused.

There is no error, and the judgment is affirmed.

SEDUCTION AS A CRIMINAL OFFENSE, GENERALLY: See the extended note to *State v. Carron*, 87 Am. Dec. 405-411.

IN PROSECUTIONS FOR SEDUCTION AND BASTARDY PROCEEDINGS, child may be shown to jury when of age which will enable jury to judge of resemblance: *Clark v. Bradstreet*, 80 Me. 454; ante, p. 221, and note; but not when the child is a mere infant: *Id.*; as in the case of a child three months of age: *State v. Danforth*, 48 Iowa, 43; 30 Am. Rep. 387.

STATE v. NARROWS ISLAND CLUB.

[100 NORTH CAROLINA, 477.]

NAVIGABLE WATERS. — Although rivers, lakes, etc., are not strictly public waters, yet if they are navigable in fact the public have a right to their use. Such waters are treated as *publici juris* in so far as they may be properly used for the purposes of navigation in their natural state.

OWNER OF BED TO RIVER, ETC., NAVIGABLE IN FACT may use the land and whatever is incident to it, including water over it, in any lawful way, but may not in so doing impede or materially interfere with navigation.

INDICTMENT FOR OBSTRUCTING NAVIGABLE WATERCOURSE must charge that such obstruction was not "for the purpose of utilizing," etc., where statute prohibits the willful obstructing such waters, "except for the purpose of utilizing water as a motive power." But obstructing waters navigable in fact is indictable at common law, however, under the common-law form.

EVIDENCE. — It is not necessary that obstructions in the way of navigation should have actually interfered with or done it injury to render them a nuisance; it is sufficient if navigation was thereby rendered less convenient, secure, and expeditious. So iron posts set in bed of navigable river may obstruct navigation, although no vessel has sustained actual injury therefrom; and evidence that some particular vessel had suffered harm is not required.

Attorney-General, for the state.

L. D. Starke, for the defendant.

MERRIMON, J. We need not decide whether the grant from the state, under which the defendant claims title to the land covered by the water called "Big Narrows," charged in the indictment to have been obstructed, was or was not void. The evidence produced on the trial went directly to prove, and the jury found by their verdict, that the water was part

of a navigable sound, and that it was in fact navigable for a large class of useful vessels, and had been used by the public for the purposes of navigation for a long while,—twenty-five or thirty years, and perhaps longer. If the water referred to was thus navigable, the public had the right to use the same for the purposes of a highway and navigation, notwithstanding the defendant may have been the owner of the bed of the river or sound. In that case, it was not material for the jury to inquire whether the defendant was such owner or not.

Navigable waters are natural highways,—so recognized by government and the people,—and hence it seems to be accepted as a part of the common law of this country, arising out of public necessity, convenience, and common consent, that the public have the right to use rivers, lakes, sounds, and parts of them, though not strictly public waters, if they be navigable in fact, for the purposes of a highway and navigation, employed in travel, trade, and commerce. Such waters are treated as *publici juris* in so far as they may be properly used for such purposes in their natural state. The public right arises only in case of their navigability. Whether they are navigable or not depends upon their capacity for substantial use as indicated. They can be so used only for the free passage of vessels; the public have only the right of navigation. The title to the bed of the river, lake, or sound in such case, and all special privileges and advantages incident thereto, vest and remain in the owner thereof, subject only to the public easement. He may use the land, and whatever is incident to it, including the water over it, in such lawful way as he will, if in so doing he does not impede or interfere materially with navigation. The limited right of the public is paramount, and shall not be abridged: *Broadnax v. Baker*, 94 N. C. 675; 55 Am. Rep. 633; *Hodges v. Williams*, 95 N. C. 831; 59 Am. Rep. 242; Gould on Waters, secs. 86, 87, 90, 110; Wood on Nuisances, secs. 576, 577, 579, 580.

The learned counsel for the appellant pressed upon our attention *State v. Glen*, 7 Jones, 821, as an authority favoring strongly the absolute right of the owner of the whole bed of the river. This is certainly a misapprehension of the real meaning of that case. The river to which it referred was ascertained to be unnavigable, and the case does not contravene what we have here said. Indeed, the court recognized the public right in case of the navigability of the stream. It said: "As the riparian proprietor of the land on both sides of

the stream, he is clearly entitled to the soil entirely across the river, subject to an easement in the public, for the purposes of the transportation of lime, flour, and other articles in flats and canoes." It appeared that flat-boats were occasionally used in transporting the articles named.

It seems that the pleader intended that the indictment should charge an offense under the statute (Code, sec. 1123) prohibiting the obstruction of watercourses, but it cannot be sustained for such purpose, because that statute provides that "if any person shall willfully fell any tree, or willfully put any obstruction, except for the purposes of utilizing water as a motive power, on any branch, creek," etc., and the indictment does not charge, as it should do, that the obstruction charged was not "for the purpose of utilizing," etc. Such charge is essential; without it, it might be the obstruction was for a lawful purpose, and there would be no offense: *State v. Norman*, 2 Dev. 222; *State v. Tomlinson*, 77 N. C. 528; Archbold's Criminal Pleadings, 25. Moreover, it may be doubted whether the statute was intended to embrace this and like cases.

But to obstruct a navigable water like that in question is indictable at common law, and we think the indictment should be upheld as sufficient to charge the common-law offense: *State v. Parrott*, 71 N. C. 811; 17 Am. Rep. 5.

We cannot doubt that the iron posts—from two to three inches in diameter—set in the earth under the water, and standing perpendicularly through and several feet above it, at the places and as described by the witnesses on the trial, were dangerous, *per se*, to the class of vessels that passed and repassed through the waters mentioned in the indictment. They were a standing menace to navigation; and though it did not appear in evidence that any vessel had suffered harm from them in the nature of the matter, many vessels might have done so, and the evidence tended so to prove, and the jury so found. It is not necessary that obstructions placed in the way of navigation should have actually interfered with and done it injury to render them a nuisance; it is sufficient to make them such if they rendered such navigation less convenient, less secure, and less expeditious; it must be free and unobstructed by artificial impediments or dangers: Wood on Nuisances, secs. 607, 608, 613.

The court should have instructed the jury that if the iron posts were such as described, and were set in the way of navi-

gation, as charged in the indictment, they constituted a nuisance; but any error in this respect was cured by the verdict of guilty.

The instructions of the court to the jury were quite as favorable to the defendant as it was entitled to have, and the judgment must be affirmed.

RIGHT OF PUBLIC TO USE OF NAVIGABLE STREAM AS HIGHWAY, and remedies available to vindicate right: See extended note to *Davis v. Winslow*, 81 Am. Dec. 582-588.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

PICKENS v. KNISELY.

[29 WEST VIRGINIA, 1.]

IN TAKING AND CERTIFYING ACKNOWLEDGMENTS OF DEEDS OF MARRIED WOMEN, A LITERAL COMPLIANCE with the statute is not essential, but a substantial compliance is exacted.

IN CERTIFICATE OF ACKNOWLEDGMENT BY A MARRIED WOMAN, the words "willingly acknowledged the same" must be treated as the equivalent of the words "willingly executed the same," prescribed in the statutory form of acknowledgment.

CERTIFICATE OF ACKNOWLEDGMENT OF DEED BY A MARRIED WOMAN MAY BE IMPEACHED AND AVOIDED by proving that she never in fact appeared before the officer, or acknowledged the deed to him; and this rule will be enforced against an innocent purchaser without notice that the certificate is false. But if she appeared before the officer for the purpose of making the acknowledgment, and attempted to do in some manner what the law required to be done, the certificate is conclusive of the facts therein stated, as regards innocent purchasers.

EVIDENCE TO IMPEACH THE ACKNOWLEDGMENT OF A DEED SHOULD BE OF THE CLEAREST, STRONGEST, AND MOST CONVINCING CHARACTER. It should be almost as strong as that required to correct an alleged mistake in a deed, and should not be loose, equivocal, or open to reasonable doubt or opposing presumptions.

WITNESS, COMPETENCY OF. — JUSTICE OF THE PEACE IS A COMPETENT WITNESS to impeach a certificate of acknowledgment signed by him; and his testimony may be received to prove that the grantor never appeared before him, nor acknowledged the deed.

HUSBAND OR WIFE MAY, UNDER THE STATUTES OF WEST VIRGINIA, GIVE EVIDENCE FOR OR AGAINST EACH OTHER in any civil action or proceeding, except that neither may disclose any confidential communication made to him or her during marriage.

COMPETENCY OF TESTIMONY IS TO BE DETERMINED BY THE STATUTES IN FORCE at the time it is read in evidence, rather than by the statute existing when the evidence was taken.

DEBT OF GENERAL CREDITOR OF MARRIED WOMAN DOES NOT CONSTITUTE ANY LIEN or charge upon her separate estate prior to the institution of a suit to subject such estate to the payment of such debt. Her general creditors have no priority over one another, unless it be acquired by superior diligence in proceeding to obtain satisfaction.

J. H. Woods and F. Woods, for the appellant.

Dayton and Dayton, for the appellees.

JOHNSON, President. On the twenty-eighth day of August, 1866, Stephen Arnold, of Barbour County, conveyed to his daughter, Sarah Jane Knisely, a tract of land in said county, "subject to this condition, that the same shall not operate as a conveyance of the legal title to said land, or the right to the possession thereof, until after the death of the said Stephen Arnold." On the fifteenth day of December, 1868, L. M. Knisely and the said Sarah Jane Knisely, his wife, executed their joint and several bond to James Pickens for the sum of \$1,650. On the ninth day of September, 1871, the same parties executed and delivered to the said James Pickens their bond for \$1,200. On the fifteenth day of December, 1868, Knisely and wife conveyed in trust to R. W. Daniels, trustee, to secure the payment of said \$1,650 bond, the said tract of land conveyed to Sarah Jane Knisely by her father, Stephen Arnold. This deed was acknowledged by the grantees before Michael Simon, a justice, on the eighteenth day of December, 1868, and was recorded on the same day. The certificate of acknowledgment as to Mrs. Knisely is as follows:—

"West Virginia, Barbour County, to wit:—

"I, *Mikel* Simon, justice of Union township, in the county aforesaid, do certify that Sarah Jane Knisely, the wife of the above-named L. M. Knisely, personally appeared before me in my township, and being examined by me privily and apart from her husband, and having the above deed of trust *date* December 15, 1868, fully explained to her, she, the said Sarah Jane Knisely, acknowledged the said *wrightly* to be her act, and declared that she had willingly acknowledged the same, and did *knot* wish to retract it. Given under my hand this eighteenth day of December, 1868.

"MICHAEL SIMON, Justice."

On the ninth day of September, 1871, the same parties conveyed the same land to Nathan J. Coplin, trustee, to secure the said twelve-hundred-dollar bond, and on the same day acknowledged the said deed before Hanson L. Hoff, justice.

The acknowledgment is in almost the same words as the acknowledgment before Justice Simon, concluding as to Mrs. Knisely: "And being examined by me privily and apart from her husband, and having the above deed of trust, dated September 9, 1871, fully explained to her, she, the said Sarah Jane Knisely, *acknowledg* the said *wrighting* to be her act, and declared that she had willingly *acknowledg* the same, and did not wish to retract it."

At April rules, 1874, Pickens filed his bill in the circuit court of Barbour County, setting forth the above-stated facts, and praying that the said deeds might be construed to ascertain what interest Sarah Jane Knisely had in the land, and that all the interest of Knisely and wife therein might be sold, and the proceeds of sale be applied to discharge said trust liens and for general relief. Sarah Jane Knisely answered the bill; and in her answer she admitted the execution of the bonds, but averred that she was only the surety of her husband, and that her separate estate could not be sold to pay said debts. She admits she signed said deeds, but says she signed them by direction of her husband. As to her alleged acknowledgment of the deed of December 15, 1868, she says: "She utterly denies that the same was ever acknowledged by her, and she says that the certificate of acknowledgment and privy examination of and by her of Justice Michael Simon, of the date of the eighteenth day of December, 1868, as the same seems to be appended at the foot of the said deed, is wholly erroneous, and contrary to truth and fact." As to the acknowledgment of the second deed of trust, she is silent in this answer. She filed an amended answer, in which she claimed that the certificates of her privy examination to said deeds were fatally defective, and said deeds were not binding on her.

L. M. Knisely answered the bill, and in his answer said: "Respondent did insist upon his wife and co-defendant, Sarah Jane Knisely, signing said obligation as respondent's surety, which she thereupon did; and she also in like manner signed her signature to the said trust deed; but he denies that she acknowledged the same, and says that the certificate of the justice to the facts stated in it as to his said wife's acknowledging the said deed are untrue, and were procured to be done by the plaintiff for the purpose of acquiring by fraud the real estate of his wife in security and discharge and satisfaction of his demand against this respondent, who was unable to pay him otherwise." He says nothing about the certificate to the

second trust-deed. He pleads usury in the debt, and claims that he is entitled to be relieved of all usurious excess.

Depositions were taken. The cause was referred to a commissioner to state an account. The report was filed and exceptions indorsed, which were not passed upon by the court. On the 30th of October, 1883, the court dismissed the bill, with costs. From this decree Pickens appealed.

The court must have dismissed the bill, because in its opinion the certificate of acknowledgment of Mrs. Knisely to the two deeds of trust executed by her on her separate estate were fatally defective; for if they are not, one of the deeds at least would be good, even if the other should be held void, on the ground that she never acknowledged it at all.

Are the two certificates above referred to fatally defective? It is well established by our court that a literal compliance with the statute is not required, but there must be a substantial compliance with all the requirements thereof: *Watson v. Michael*, 21 W. Va. 568. Do the certificates substantially comply with the statute? We have but one case in our court having any bearing upon the subject, and that is *Watson v. Michael*, *supra*, where it was decided that the words "and the deed being read to her" were not equivalent to the words required by the statute, "being fully explained to her." In all of the other cases there was a clear omission of one or more of the positive requirements of the statute. Here the omitted words are, "willingly executed the same"; and the substituted phrase is, "had willingly acknowledged the same." These certificates show that the married woman personally appeared before the justice, and proceed, "and being examined by me privily and apart from her husband, and having the above deed of trust date December 15, 1868 [in the one case, and September 9, 1871, in the other], fully explained to her, she, the said Sarah Jane Knisely, acknowledged the writing to be her act, and declared that she had willingly acknowledged the same, and did not wish to retract it."

In *Boykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 349, the statute required the certificate to show "that she signed and sealed and delivered the same as her voluntary act and deed, without any fear, threats, or compulsion of her husband." The certificate showed "that she signed, sealed, and delivered the above instrument of mortgage deed on her own free will and accord, and without any fear, persuasion, or threats from her said husband, and for the express purposes therein stated."

The court decided that the certificate was not, either in words or substance, the acknowledgment required by law. It was essential that she should acknowledge, among other things, that she executed the mortgage "without any fear." She has not acknowledged this, nor anything in substance the same. It will not do to say she acknowledged something like it. Resemblance is not identity. Fear may exist on the part of the wife without any force, persuasion, or threats from the husband. Her acknowledgment that she executed the deed on her own free will and accord is not identical in substance with acknowledging that she executed it freely, without any fear of her husband. Fear may exist, and often does exist, in a degree so moderate as not to destroy the freedom of the will."

In Pennsylvania, the statute required that the person taking the acknowledgment "should read to the wife, or otherwise make known to her the full contents of the deed." In *McIntyre v. Ward*, 5 Binn. 296, 6 Am. Dec. 417, it appeared that the certificate of acknowledgment showed that the wife "acknowledged the indenture of bargain and sale to be her act and deed, according to its true intent and meaning, and the land and premises therein mentioned to be bargained and sold with all and every the appurtenances to be the right, title, interest, estate, and property of the within-named Samuel Todd, his heirs and assigns forever." The court held that a substantial compliance with the statute. Tilghman, C. J., for a majority of the court, said: "She knew then that the land was conveyed to Todd in fee-simple, which is the essential part of the deed; and it may be fairly presumed that this was communicated to her by the justices who took her acknowledgment, although I do not consider that to be material, provided it appears she had the knowledge. . . . Considering the whole of this certificate, then, it sufficiently appears that the contents of the deed were known to her."

In *Shaller v. Brand*, 6 Binn. 435, 6 Am. Dec. 482, it appeared the statute directs the person taking the acknowledgment of a married woman "shall examine the wife separate and apart from her husband, and shall read or otherwise make known to her the full contents of the deed; and if, upon such separate examination, she shall declare that she did voluntarily, and of her own free will and accord, seal, and as her act and deed, deliver the said deed, without coercion or compulsion by her husband, then the said deed shall be good and valid." The

certificate as to the wife showed only this: "She, the said Catharine, being of full age, separate and apart from her husband by me examined, and the full contents made known to her, voluntarily consenting thereto." In this case, Tilghman, C. J., delivering the opinion of the court, said: "It is not straining the expression 'voluntarily consenting thereto' too far to say that it implies she declared that she executed the deed voluntarily, and that is sufficient; for if the execution was voluntary, it was without coercion or compulsion. I am clearly of opinion, therefore, that by this deed the estate of the wife was legally conveyed."

We do not say that we approve those two decisions in their entirety, but cite them to show how liberal the supreme court of Pennsylvania has been in holding words used to be the equivalent of those required by the statute. We shall not have to go to this extent of liberality to hold the certificates here a substantial compliance with the statute.

In giving a construction to the language used, we must look to the whole certificate, just as we would in construing any other instrument. The justice certifies that he has examined Mrs. Knisely separately and apart from her husband; that during such privy examination he fully explained to her the said writing; that she then acknowledged the same; that she then declared that she "had willingly acknowledged the same, and that she did not wish to retract it." When it is said she had willingly acknowledged the same, it seems clear to us, taking the whole certificate together, it was not meant that she had, during the privy examination then being had, "willingly acknowledged the deed." There would be no meaning in that. It was not the duty of the justice to ask her whether she was willingly then acknowledging the paper, or whether she was willingly then declaring that she had "willingly" executed the same, and did not then wish to retract it.

If we give the certificate the construction contended for by counsel for appellee, we would have to hold that, during her examination separate and apart from her husband, she acknowledged the deed, and declared that she had willingly then acknowledged it, and she did not wish to retract the acknowledgment thus willingly made. What was it she declared that she did not wish to retract? Certainly, the execution of the deed. And when she declared that she "had willingly acknowledged the deed," she meant that she had willingly executed it; that is, she declared that she had will-

ingly signed and sealed the deed, free from the control of her husband, and that act she did not wish to retract. This is the true sense and construction of the instrument; and it would be technical indeed to hold that this was not a substantial compliance with the statutory requirement. In the case of *Boykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 349, there were no words used which, by any reasonable construction, could be held to mean that she had executed the deed without any fear of husband. It was necessary that such words should be used. Here, we think, it is plain that every requirement of the statute was complied with.

But as to the deed of December 15, 1868, a more serious question is raised. The answers of the defendants both plead the fact that Mrs. Knisely never acknowledged that deed at all. This is sustained by her own deposition, and also by the deposition of her husband, L. M. Knisely, and by the justice, Michael Simon; and there is not a particle of evidence, save the certificate itself, to contradict these witnesses. This raises the interesting question, whether, under any circumstances, the certificate of the justice or notary to the examination of a married woman can be contradicted by parol; and the further question, whether, if so, the evidence of the justice or notary is competent to impeach it. The case of *Harkins v. Forsyth*, 11 Leigh, 294, takes very strong ground against both propositions.

In that case a bill was filed to enforce a deed of trust. Mrs. Harkins, in her answer, admitted that she signed the deed. She averred that the two justices of the peace asked her, in the presence of her husband, if she acknowledged it to be her act and deed, and had willingly signed, sealed, and delivered the same, and whether she wished to retract it. But she averred, and she charged the fact to be, that the justices did not read the deed to her, nor in any manner whatever explain it to her. On the part of the defendants, the depositions of both the justices were taken; and they say that they did not read or explain the deed to Mrs. Harkins, it not being their habit to do so. The court decreed the land to be sold. Elizabeth Harkins appealed. Tucker, president, said the question was one of great importance, and of first impression in that court. After stating that, at common law, a married woman could not, by joining in a deed, bar herself or those claiming under her of her own estate, he said: "In process of time, fines were adapted to this end, by which the rights of a

wife might be successfully passed. But to prevent imposition upon her, it was at length provided by statute that where a *feme covert* was one of the parties to a fine, she should be privily examined, and if she refused her assent, the fine should not be levied. He says this proceeding was the prototype of our privy examination. But though the privy examination was positively enjoined by statute, yet if a *feme* was allowed to acknowledge a fine without examination, it nevertheless bound her, and could not be reversed; for she could not contradict the record, which set forth her examination. He shows that, in Virginia, as a substitute for the fine, a deed accompanied by a privy examination of the *feme* has been adopted, which could be either before a court of record or before two justices of the peace. In both cases, the same requisitions exist. Where this examination is had in court, it must be conceded that it is altogether conclusive, and that no allegation can be admitted to contradict the entry, however much that may be at variance with the real facts. The second mode of privy examination is by two justices of the peace; and it seems to be supposed that, because it is a matter *in pais*, the certificate of the justices may be directly contradicted and the deed vacated by the testimony of witnesses, and even by the depositions of the justices themselves. He says such a position is at variance with the spirit and object of the law, and also with the very terms of the law. He further says: "If the door be once opened to the contradiction of the magistrates' certificates, where is the point at which we shall stop? The writing must be explained; and if the certificate that it was explained can be contradicted, what shall prevent inquiry whether it was truly explained? For, if not truly explained, the condition of the *feme* is surely not better than if the deed were not explained at all. . . . To me, indeed, it seems that the demon of mischief could not suggest a notion better calculated to throw all things in relation to titles into their original chaos than the establishment of the principle here contended for."

He admits that, notwithstanding the conclusiveness of the certificate at law, the *feme* may be relieved in equity when it has been obtained by the fraud of the party claiming under the deed. In that case, there was no proof of fraud. At most it was the omission to carry out one of the requirements of the statute. It is a very different case in which the married woman was not before the justice at all, or, being there, had

positively refused to acknowledge the deed, or make the declaration that she had willingly executed and did not wish to retract it, and the justice willfully or corruptly in the one case or the other certifies to falsehoods throughout.

In *Rollins v. Menager*, 22 W. Va. 461, this court followed *Harkins v. Forsyth*, *supra*, and decided that, in a case like that, where there was no proof of fraud, the *feme covert* will not be permitted by parol evidence to contradict the facts set out in the certificate of her private examination, acknowledgment, and declaration, so as to avoid the effect of the deed of trust, unless she first establish by evidence, satisfactorily, that, with the concurrence of those claiming under the deed of trust, the married woman has been defrauded or imposed upon by the pretended privy examination, acknowledgment, and declaration.

The authorities hold that the certificate by a justice or notary of the privy examination, acknowledgment, and declaration of a married woman as to the execution of a deed by her is, in its nature, a judicial act, and, in the absence of fraud or duress, is conclusive of the facts certified; that a purchaser *bona fide*, and without participation in or notice of the fraud, is protected by it; but as to all other persons, parol evidence is admissible to show fraud or duress connected with the acknowledgment: *White v. Green*, 107 Mass. 325; *Moore v. Fuller*, 6 Or. 272; 25 Am. Rep. 524; *Singer Mfg. Co. v. Rook*, 84 Pa. St. 442; 24 Am. Rep. 204; *Johnston v. Wallace*, 53 Miss. 831; 24 Am. Rep. 699; *Stone v. Montgomery*, 35 Miss. 83; *Rocnovak v. Marak*, 54 Tex. 201; 38 Am. Rep. 623; *Williams v. Powers*, 48 Tex. 141; *Louden v. Blythe*, 87 Pa. St. 22; 67 Am. Dec. 442; *Michener v. Cavender*, 38 Pa. St. 334; 80 Am. Dec. 486; *Jameson v. Jameson*, 3 Whart. 457; *Schrader v. Decker*, 9 Pa. St. 14; 49 Am. Dec. 538; *Baldwin v. Snowden*, 11 Ohio St. 203; 78 Am. Dec. 303; *Hecter v. Glasgow*, 79 Pa. St. 79; *Ennor v. Thompson*, 46 Ill. 214; *Luckman v. Harding*, 65 Id. 505; *Kerr v. Russell*, 69 Id. 686; 18 Am. Rep. 634; *Rollins v. Menager*, 22 W. Va. 461; *Henderson v. Smith*, 26 Id. 829; 53 Am. Rep. 189.

Schrader v. Decker, *supra*, was a very hard case, and yet it was held that, even under those circumstances, a *bona fide* purchaser without notice could not be affected by the fraud; but in that case, the wife was relieved, because the grantee participated in the fraud. The circumstances, as stated by the judge, were as follows: The deed was given to a tavern-

keeper, partly in payment of a profligate husband's debt contracted in a course of drunkenness and debauchery, and was thus procured: Means, the grantee, attended by his wife and a man called Doninger, who had no proper concern with the business, and an inexperienced justice picked up by the way, repaired to the house of the husband, while the wife was in the throes of childbirth. Means, his wife, and Doninger entered the sick woman's chamber, and met, in the first instance, with a repulse they had reason to expect. It was not until she had been badgered for two hours, and worn out by the importunity of her husband, as well as deceived with false assurances by the rest of the party of her husband's right and ability to redeem the land, that they worked her to their will. The justice was then called in, and having first asked her, in the presence of her husband, whether the instrument she had executed was her deed, he signed the certificate which had been brought along for the occasion. Chief Justice Gibson then says: "If these circumstances are proved, particularly the crisis selected for the transaction, the instruments employed to bend her to their purpose, and the deception effected by the false assurances, they will show the existence of a conspiracy to strip her of her property by force and fraud; and the jury will have no more to do than to find for the plaintiff all the land which had not been paid for to Means or his voluntary grantee, and all that may have been paid for with knowledge of the fraud. To do less would disgrace the administration of justice." The judgment was reversed, and a new trial granted.

In *Central Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597, it appeared that a wife was by threats and intimidation induced to sign and acknowledge a mortgage deed. A bill was filed to foreclose, and the wife in her answer pleaded the threats and intimidation, and proof was taken which clearly showed it. It did not appear that the grantee participated in the fraud, or had any notice of it; yet the court held that the fact the mortgagee took no part in the execution of the mortgage by the wife does not strengthen his right to set it up as valid, nor impair hers to avoid it. The acceptance of a mortgage implies adoption by the mortgagee of the husband's agency in procuring it.

This decision we disapprove, as it seems to us to be against both reason and authority. As between the grantor and grantee, who participated in the fraudulent execution or ac-

knowledge of the deed, it is, in a court of equity, open to impeachment; but where the grantor signed and acknowledged the deed, it cannot be impeached as to an innocent purchaser. But how stands the case of a married woman whose acknowledgment of a deed appears regular on its face, yet she never appeared before the justice who wrote the acknowledgment?

In *Michener v. Cavender*, 88 Pa. St. 334, 80 Am. Dec. 486, the court decided that, where in a mortgage of a married woman's separate estate the alderman falsely or by mistake certified to the separate examination and acknowledgment of the wife, who neither signed the mortgage nor appeared before him, the mortgagee will be affected by the fraud, though he was not present at the acknowledgment nor informed of what passed. He will not be presumed to be a *bona fide* purchaser; nor is it necessary to prove notice to him of a fraudulent mistake. Woodward, J., after stating the law, as we have above, said: "Such is the doctrine of the cases in our books, and on the strength of it the learned judge ruled that the gross blunder, if not fraud, of the alderman in certifying to the separate examination and acknowledgment of a wife, who had not signed the mortgage, nor appeared before him, could not affect Cavender, the mortgagee, because he was not present when the mortgage was acknowledged, and was never informed of what passed, and that he was to be presumed to be a *bona fide* purchaser. If the doctrine of notice is to be applied in this manner, no married woman's estate is safe, and the statutes that have been passed for her protection are as worthless as waste paper; for whenever her husband goes into a conspiracy to strip her of her lands, the transaction is not likely to be attended with any circumstances of notice that are susceptible of proof. Here, for instance, is a mortgage upon Mrs. Michener's separate estate made to a conveyancer, and duly witnessed and acknowledged, which, for aught that appears of record, she never saw nor heard of until she was sued upon it by this *scire facias*. Her name appears to the printed copy on our paper books, but when or by whom it was subscribed to the original instrument does not appear. It certainly was not there when the alderman witnessed and acknowledged the mortgage. The statute requires the signature to precede the acknowledgment, and without signature and acknowledgment according to the statute it is not and cannot be a mortgage on her estate. To call the mortgagee a *bona*

fide purchaser, and to put her to proof that he knew she had been cheated, would be like making her right to reclaim stolen goods dependent on the receiver's knowledge of the felony. Suppose the mortgage was a forgery out and out, and Caverder chose to invest his money in a purchase of it, must it be enforced because he did not know he was buying a forged instrument? An instrument known to be forged would not be purchased, and would therefore be worthless to the forger. Counterfeit notes would never be issued, if a herald went before to proclaim their spuriousness. But because they are taken without notice, do they become genuine? Is every bank and individual to redeem whatever obligations *bona fide* holders may obtain against them, without regard to the question whether the obligations have ever issued or not? To carry the law of notice to such an extent would subvert all law and justice. . . . The only excuse the alderman gives for his reckless conduct is, that 'George told me it was a temporary matter, and that he would make it all right, if Mr. Caverder objected.' To George and the alderman Mr. Caverder must look to make it all right; but he must not touch Mrs. Michener's separate estate by means of such a mortgage."

In *Allen v. Lenoir*, 53 Miss. 321, the bill was filed to foreclose a mortgage purporting to have been executed by both husband and wife, and purporting to have been acknowledged by the wife. In her answer, she stated that "the deed was signed by her, but was never acknowledged, because, when she went to Beulah for the purpose of acknowledging said mortgage, she was informed that the clerk of the probate court, John B. Hunt, was intoxicated, and declined to see her, and she left the mortgage in the store of Martin and Christmas, adjoining the office of said clerk, intending to return and acknowledge it; but she never did see said clerk, John B. Hunt, in relation thereto, and never did acknowledge said mortgage before said Hunt, or any other officer." Thomas B. Lenoir, in his deposition, stated that he went to Beulah to get the mortgage, that it was then in the hands of the clerk, and there was no certificate of acknowledgment to it. The clerk, John B. Hunt, stated to deponent that "he had been told Mrs. Lenoir had been there, but he was not fit to be seen by a lady, and did not see her, and had not seen her since; but as she had previously acknowledged a similar mortgage before him, and he knew her handwriting, he would not give

them any further trouble, but would certify to it." Lenoir also stated in his deposition that the certificate of acknowledgment by Mrs. Lenoir to the mortgage was made by the clerk, John B. Hunt, at deponent's request. There was some other testimony. The court ordered a sale of the mortgaged property, and an appeal was taken.

Campbell, J., delivering the opinion of the court, said: "We cannot escape the conclusion, after an earnest effort to avoid it, that the mortgage was never acknowledged by Mrs. Lenoir, and that the certificate that she had acknowledged it is untrue. A proper acknowledgment is an essential part of the conveyance of her land by a married woman. The bill charges the execution of the mortgage by Mr. and Mrs. Lenoir. In the answer she denies that she ever acknowledged it. There is nothing but the official certificate of her acknowledgment to contradict her answer, which is supported by a number of circumstances which fully sustain it." The decree was reversed.

In *Johnston v. Wallace*, 53 Miss. 831, 34 Am. Rep. 699, it was held that a deed having been signed by a husband and wife, and she having appeared before an officer competent to take her acknowledgment, and having acknowledged it in some manner, and he having certified on the deed that she had acknowledged on a private examination, separate and apart from her husband, that she had executed the deed freely and voluntarily, without any fear, threats, or compulsion on the part of her husband, the truth of the certificate as to its statements cannot be questioned as against a *bona fide* purchaser. It was also decided that the case did not present the question whether a certificate of acknowledgment can be shown to be a fraud and forgery, which was decided in the affirmative in *Allen v. Lenoir*, *supra*, to which view the court adheres. In this case, Campbell, J., who also delivered the opinion in *Allen v. Lenoir*, *supra*, draws a distinction between the case in which the married woman was not before the justice for the purpose of acknowledging a deed, and the case where she does appear and acknowledge it in some manner, and the justice certifies to parts of such acknowledgment that are false. In the latter case, the court holds that, as against a *bona fide* purchaser, the certificate cannot be impeached, and in the other, it can be impeached. The court says as to the former case: "But where the person never appeared before an officer to acknowledge the deed, but he falsely certifies that

she did, his act is wholly without authority of law, and void *in toto*. All must be subject to the risk of an occasional forgery by officers authorized to take acknowledgments. Although liable to be deceived and imposed on by such an act, no one can claim that a married woman's estate should be divested by forgery. And when she in fact did not appear before the officer to acknowledge, although he may certify that she did, she may show that she did not; for his act is wholly without authority, and she but rights herself and wrongs no one in proving the truth of the case; for no one can claim by virtue of a forgery. The law requires no other evidence of the acknowledgment of a deed by a married woman but the prescribed official certificate. Indeed, no other evidence of acknowledgment besides the official certificate can be received. A cloud of witnesses attesting the fact of the fullest acknowledgment will not supply the want of the official certificate of acknowledgment, or an omission in it when made."

In all the cases the struggle has been to protect the married woman in her right of property, on the one hand, and the innocent purchaser who has parted with his money for her land, on the other, and to uphold the rights of land-owners, who must necessarily rely on the correctness of the records of land titles for their protection. Therefore it has been uniformly held that as regards an innocent purchaser of the land of a married woman, the certificate of her acknowledgment of the deed by an authorized officer is conclusive of the facts which are therein stated. This principle, it is contended, applies to every case where the acknowledgment has been certified by an officer authorized to take it, whether the married woman ever acknowledged it or not. But I have found no case where it has been held that if it clearly appeared by proper parol evidence that the married woman never in fact appeared before the officer to acknowledge the deed, and the certificate contains all the requirements of the law, just as though she had in fact appeared before the officer, the deed would operate to divest her estate even in favor of an innocent purchaser; but we have cited two cases where it has been held that under such circumstances her estate could not be divested. It does seem to me that, strong as may be the claims of innocent purchasers who have been thus imposed upon by the gross fraud and collusion of a wicked husband, and a justice who has no regard for the rights of property, yet the claim of an innocent wife who, without the least fault of hers, has thus been the victim

of such an attempted spoliation of her land makes a much stronger appeal to the court.

Our constitution requires the legislature to "pass such laws as may be necessary to protect the property of married women from the debts, liabilities, and control of their husbands": Sec. 49, art. 6. The legislature has done so, and thrown around the married woman many safeguards, one of which is the law that no deed shall convey her property, unless she has been by a proper officer examined privily and apart from her husband in relation thereto, and, after it has been fully explained to her, she then acknowledges it and declares that she willingly executed it, and does not wish to retract it. It would give her but little protection if a certificate of such privy examination, acknowledgment, and declaration could take from her her estate, when in fact she did not know that any such certificate was contemplated, and did not appear before such officer at all.

For reasons of public policy, and to protect innocent purchasers, it has been uniformly held that when a married woman appears before a justice for the purpose of acknowledging a deed, and does in some manner attempt to do what the law requires to be done, the certificate is conclusive of the facts therein stated, as regards innocent purchasers. This is a necessary rule of law, and not a harsh one to her; because, if the justice has not asked her all the questions required, or has omitted anything which the statute requires, as fully explaining the deed to her, she may notify the purchaser of that fact before the deed is delivered to him, and thus prevent it from operating to pass her title to the property. But where she has not appeared before the officer, she has no opportunity to save her property, any more than the man has whose name is forged to a negotiable note. In the case of the note no one would hesitate to say that it would be void in the hands of an innocent holder for value. Why, then, should it be said that the married woman should be held for the act of the justice, which was as much without authority or warrant in law as the forgery of the man's name to the note? If this can be done, there is no protection to a married woman's property, — there is no protection to any man's real estate; for it is just as easy for a justice who has no fear of consequences to forge the signature of a man to a deed conveying his farm to another, and then make a false certificate of his acknowledgment thereof, as to make the false certificate of the acknowl-

edgment of a married woman. The purchaser could then take it from the one who had procured the justice to do the act, and be entirely innocent of the forgery and fraud.

No one would for a moment suppose that under such circumstances the man thus imposed upon should lose his farm. The innocent purchaser in such a case would have every reason to believe that the deed had been signed by the grantor, or that it had been signed for him by another, because he had, according to the certificate of the justice, acknowledged it as his signature, which would be conclusive against him, if he could not impeach it in the hands of an innocent purchaser.

A married woman's signature to a deed amounts to nothing in any one's hands, as to her, until she has acknowledged the deed before a proper officer after privy examination, and he has certified that all the requirements of the statute have been complied with, and the deed has been recorded. She ought to have the same right to impeach the certificate of her appearance before the officer making it, when in fact she did not appear before him, that a man has to prove a deed professing to be signed by him to be a forgery. The rights of property are too sacred to allow them to be swept away without the knowledge of the owner, when he has made no contract of sale with the pretended purchaser. No consideration of public policy can justify the robbing of a married woman of her separate estate.

If, therefore, it legally appears in this record that the deed of the 15th of December, 1868, which appears to have been properly acknowledged by Sarah Jane Knisely by the certificate of Michael Simon, the justice, was not acknowledged by Mrs. Knisely,—that is, if it appears by proper proof that that certificate is totally false, that Mrs. Knisely never appeared before said justice to acknowledge said deed,—the deed, as to her, is void, even in the hands of an innocent purchaser for value. In a case of this character, the proof to sustain the impeachment of the certificate should be of the clearest, strongest, and most convincing character: *Hourtienne v. Schoorer*, 24 Mich. 274; *Kerr v. Russell*, 69 Ill. 666; 18 Am. Rep. 634. The proof should be almost, if not quite, as strong as that required to correct a mistake in a deed; that is, it should not be loose, equivocal, or open to reasonable doubt or opposing presumptions: *Jarrell v. Jarrell*, 27 W. Va. 743. The reason for this is, that the writing itself is regarded as evidence so strong that only other unequivocal evidence irre-

sistibly conclusive is sufficient to overthrow it. It is not necessary that there should be no opposing or contradictory evidence; but the evidence that the certificate is totally false must be so strong as to remove every reasonable doubt.

If the evidence in this cause is competent, it comes up to the full requirement of the rule as we have stated it. There can be no doubt of the fact, if the evidence is competent, that Mrs. Knisely never appeared before Justice Simon at all to acknowledge the deed of December 15, 1868, as certified by said justice in his certificate attached to the deed. Mrs. Knisely herself testifies that she did not appear before him; and both Knisely and the justice depose that the justice made the certificate in the absence of Mrs. Knisely, while he was sitting on his horse in the public road. The justice, in his deposition, which was excepted to in the court below for incompetency, says that Mrs. Knisely did acknowledge before him a deed of trust to secure the \$1,650 to Pickens, which deed was executed to W. W. Daniels, trustee. He says she never acknowledged but one deed of that kind. Being asked whether, after he had taken her acknowledgment as stated, L. M. Knisely did not bring another deed of trust bearing date as before stated to W. W. Daniels, trustee, to secure the plaintiff the said sum of \$1,650, and if so, what he did with said deed of trust, he answered: "Like a deed of trust was acknowledged this morning, and the evening of the day after, L. M. Knisely met me on the road, and says to me: 'Squire, Pickens objects to the deed of trust on account of your certificate'; and I asked him what was the matter with that. 'Well,' says he, 'you put both certificates of me and my wife in one'; and then he said: 'I have drawn up new certificates for you by an old one I had, and the deed of trust is all right, with the exception of your certificate.' Then I took the deed of trust and looked at it, and I saw his name and William Daniels's name, which I thought to be the same one. The same amount, at least, was in it, and her name. I saw the certificates were changed, and then I signed them. I had been in the practice of not drawing up the certificates to the acknowledgment of a deed for perhaps a month or more after the acknowledgment. I suppose I did not have this particular deed of trust when Mr. and Mrs. Knisely acknowledged the deed of trust, but it was one of the same date and the same amount. L. M. Knisely, to the best of my recollection, never acknowledged the deed as certified to."

But it is here insisted that Justice Simon's testimony was incompetent to impeach his certificate. In *Harkins v. Forsyth*, 11 Leigh, 294, it was not only held that the justice's testimony was incompetent, but also that all testimony was incompetent to impeach the certificate in that case, because there was no fraud or duress claimed. In a case like that, we have seen, the authorities generally hold that evidence cannot be heard to impeach the truth of the certificate.

In *Jourdan v. Jourdan*, 9 Serg. & R. 268, it was held that the deed of a married woman was void, where the certificate of her examination did not show that she was examined separate and apart from her husband, and that the parol evidence of the justice was inadmissible to show that he in fact did examine her separate and apart from her husband.

In *Stone v. Montgomery*, 35 Miss. 83, the deposition of the justice was taken to show that the statements made in his certificate were untrue, and the court said: "We are of opinion that the officer could not be examined for such a purpose. His official acts are done and certified under oath, and it would be mischievous in the extreme to permit such a person to appear as a witness and falsify his own solemn act. Such a course would expose weak or dishonest officers to the most dangerous temptations, and render the tenure of property unsafe and precarious by subjecting the evidences of titles under which it was held to the frail and uncertain memory or to the corruption of officers who have in due form certified to the regularity of their acts." In that case the only irregularity claimed was, that the examination of the wife was "in the presence of her husband."

In *Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597, it was held that the magistrate who took the acknowledgment of a married woman to a deed is not, from considerations of public policy, if from no other, a competent witness to contradict or impeach his certificate of acknowledgment. In that case it clearly appeared that the wife was before the justice; but it was insisted that by threats, etc., she was induced to acknowledge the deed.

In *Allen v. Lenoir*, 58 Miss. 321, evidence of the declarations of Hunt, who took the acknowledgment, which declarations showed that the married woman was not before him, were objected to, and the supreme court said: "The chancellor did err in not suppressing the evidence of what Hunt, the clerk, whose certificate of acknowledgment appears on the mortgage, told

the witness about the certificate. It was incompetent, both because it was hearsay and because it impeached the official certificate of Hunt."

In the case of *Michener v. Cavender*, 38 Pa. St. 334, 80 Am. Dec. 486, the only evidence to impeach the certificate was given by the alderman who took the acknowledgment. He testified that the married woman was not before him to be examined at any time. His testimony was taken under exception to his competency as a witness to contradict his own official act. Judgment was had against the married woman in the court below, on the ground that the certificate could not be impeached, even under these circumstances, in the hands of an innocent purchaser. The supreme court reversed the case, and necessarily considered the testimony of the alderman, although the question of his competency was not alluded to in the opinion. The court quotes from his evidence without saying anything about his competency.

In *Rollins v. Menager*, 22 W. Va. 461, the statement of the case (page 465) shows that the justice who took the acknowledgment was examined as a witness; but it appears that his evidence was in favor of, and not against, his certificates. His evidence is also referred to in the opinion (page 471). There seems to have been no exception to it; and there could be no legal exception to it, because it did not tend to impeach his certificate. It was formerly held that attesting witnesses to a will could not contradict the facts set out in their attestation: *Goodlittle v. Clayton*, 4 Burr. 2224. But this court has held that the question of the execution of a will is to be determined, like any other, in view of all the legitimate evidence in the case, and no controlling effect is to be given to the testimony of the subscribing witnesses. Their direct participation in the transaction must, of course, under ordinary circumstances, give great weight to their testimony; but it is liable to be rebutted by other evidence, either direct or circumstantial. But it was further held that the testimony of a subscribing witness against the validity of a will must be viewed with suspicion: *Webb v. Dye*, 18 W. Va. 376.

It seems to us that it is admissible to hear the evidence of a justice who took the acknowledgment of a married woman to prove that she never did in fact appear before him to acknowledge a deed, although he has certified that she did. It is, of course, permitting him to testify to his own baseness; but though his evidence must be by court and jury viewed

with suspicion, yet we think it is competent in such a case, and should be received for what it is worth, and unless supported by other facts and circumstances in the case, it would not be regarded as sufficient to impeach his certificate. Especially do we think that in this state his evidence is competent, since even the parties in interest, with certain exceptions, are competent to testify in their own behalf.

But it is insisted that the testimony of Knisely and wife was incompetent. The record does not show the date at which their depositions were taken; but the decree dismissing the bill was entered on the thirtieth day of October, 1883. On the twenty-seventh day of March, 1882, the legislature passed an act declaring that "in any civil action, suit, or proceeding, the husband or wife of any party thereto, or of any person in whose behalf any such suit or proceeding is brought, prosecuted, opposed, or defended, shall be competent to give evidence the same as any other witness on behalf of any party to such suit, action, or proceeding, except that no husband or wife shall disclose any confidential communication made by one to the other during their marriage": Acts 1882, sec. 22, c. 160, p. 544. This act went into effect ninety days after its passage, on the 27th of June, 1882, so that it was in full force and vigor when the decree of October, 30, 1883, was heard on the depositions, etc. The language is, the husband and wife "shall be competent to give evidence." Within the meaning of said section, the competency of the testimony taken is determined at the time the court reads it, and not at the time the depositions are taken: *Zane v. Fink*, 28 W. Va. 693. So at the time these depositions were read, both husband and wife were competent to give evidence. Therefore the testimony of Knisely and wife was competent.

The evidence, all being competent, leaves no doubt that the married woman, Mrs. Knisely, never acknowledged said deed, and it is therefore void as to her. The second deed of trust, we have found, is valid; but it is necessarily subject to the life estate of Stephen Arnold, the grantor of Mrs. Knisely, as appears by the terms of the deed: *Love v. Teter*, 24 W. Va. 745.

It is claimed that the land is subject to the curtesy initiate of the husband and father; that if the deeds were void, still the bill ought not to have been dismissed because Mrs. Knisely signed the notes, and the rents and profits of her real estate are subject to their payment. No such relief as is claimed could be had in this suit. The bill was not filed for any such

purpose, and it could not be amended for such a purpose, as that would make an entirely new case. The debt of a general creditor of a married woman does not constitute a lien or charge upon her separate estate, real or personal, prior to the institution of the suit by such creditor to subject such estate to the payment thereof. General creditors of a *feme covert* have no priority over each other, unless it be acquired by superior diligence in proceeding to obtain satisfaction: *Hughes v. Hamilton*, 19 W. Va. 366; *Piercy v. Beckett*, 15 Id. 444; *Lamb v. Cecil*, 28 Id. 653.

We have examined the evidence, and do not think that the usury charged in the answer is proved.

For the error which we have pointed out, the decree of October 30, 1883, is reversed, with costs to the appellant, and this cause is remanded to be further proceeded in according to the principles herein announced.

GREEN, J., dissented in a very lengthy opinion. He maintained that the taking of the acknowledgment of a married woman to a deed was in the nature of a judicial act, "and that she cannot, by parol evidence, contradict the facts set out in the certificate of the justice, so as to avoid the effect of such deed, when it has been executed by her and duly recorded with the appended certificate in due form, unless she first establish, by satisfactory parol evidence, that, with the concurrence of those claiming the land under her deed, she had been defrauded or imposed upon by the pretended privy examination of her by the justice." But it is well known that a judicial act, or what appears to be a judicial act, may be avoided by showing that the court acted without jurisdiction. Hence it would seem to be open to any one to show that a certificate of acknowledgment affecting his property, whether regarded as a judicial act or not, was granted by a judge to whose authority or jurisdiction he had never submitted. Judge Green, however, likened the taking of the acknowledgment of a married woman to the entry of a fine, and said: "It only remains to inquire whether if the entry on the record-book of a court of general jurisdiction, and which court only could enter a fine, was, that the married woman personally appeared before the court and acknowledged the fine in the appropriate manner, she could, by parol evidence, contradict this statement on the record-book. I think it well settled that she could no more contradict the statement on the record that she personally appeared before the court than she could contradict the further statement on the same book of such court that she acknowledged the fine in the proper manner."

THE SUFFICIENCY OF CERTIFICATES OF ACKNOWLEDGMENT OF MARRIED WOMEN was again before the court of appeals of West Virginia in the case of *Laidley v. Land & Co.*, 30 W. Va. 505. The certificate in question was as follows: "State of West Virginia, County of Cabell. Personally came before me, the undersigned, recorder of the county and state aforesaid, Sarah H. G. Pennybacker, wife of the above-mentioned John Pennybacker, and party to the foregoing deed, and being examined by me privily and apart from her husband, and having the deed aforesaid fully explained to her, she,

the said Sarah H. G. Pennybacker, acknowledged that she had willingly signed, sealed, and delivered the same, and wished not to retract it." The certificate of acknowledgment was declared to be fatally defective. This declaration was founded on the peculiar language of the statute, which is to the effect that a wife seeking to acknowledge a deed must appear before a proper officer, and must, on being examined privily and apart from her husband by such officer, and having the instrument fully explained to her, acknowledge the same to be her act, and declare that she has willingly executed the same. The use of both of the words "acknowledge" and "declare" was adjudged to be essential. It was said that if the word "acknowledge," as used in the certificate, could be treated as equivalent to the word "declare," then the word "acknowledge" must be regarded as omitted; that the statute required the use of both words, or of terms of equivalent import, and in no event could the use of one only of these words be deemed equivalent to the use of both. After reviewing the case of *Blair v. Sayre*, 29 W. Va. 604, and several others decided under the same or similar statutes, the court said: "In these cases it is expressly decided that the certificate, as to the wife, must not only show that she *acknowledged* the deed, but that she *declared* she had willingly executed the same, and that she did not wish to retract it. It must contain the acknowledgment and two declarations. Each of these are separate, different, and distinct requirements of the statute. They are matters of substance, and not of form; and therefore, unless the certificate shows upon its face that each and all three of them have been complied with, it is void as to the wife."

IN CERTIFICATE OF ACKNOWLEDGMENT OF DEEDS, a substantial compliance with the statute is all that is required: Note to *Livingston v. Kittelle*, 41 Am. Dec. 168-179.

ACKNOWLEDGMENT OF DEED BY MARRIED WOMAN is essential to its validity. The essentials of the acknowledgment and certificate are considered in note to *Livingston v. Kittelle*, 41 Am. Dec. 179-184; *Boykin v. Rain*, 28 Ala. 332; 65 Am. Dec. 349.

IMPEACHING ACKNOWLEDGMENT. — The rule of the principal case is well sustained to the effect that an acknowledgment may be impeached by proving that the grantor never appeared before the officer, nor made any acknowledgment of the deed to him; but that it may not be impeached, as against an innocent purchaser, on account of any error or omission in taking it, when the certificate is regular in form, and the grantor knew that he or she was in the presence of a competent officer who was making an attempt to take such acknowledgment: *Smith v. Ward*, 2 Root. 378; 1 Am. Dec. 80, and note 81-83; *Michener v. Cavender*, 38 Pa. St. 334; 80 Am. Dec. 486; *Kocomeh v. Marak*, 54 Tex. 206; *Johnston v. Wallace*, 53 Miss. 331; 34 Am. Rep. 699; *Williamson v. Carakaden*, 36 Ohio St. 664; *Baldwin v. Snowden*, 11 Id. 203; 78 Am. Dec. 303; *Dodge v. Hollinshead*, 6 Minn. 25; 80 Am. Dec. 433; *Cover v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552.

COMPETENCY OF OFFICER WHO HAS CERTIFIED AN ACKNOWLEDGMENT in due form, as a witness to impeach his acknowledgment, is denied: *Higberger v. Süßler*, 21 Md. 338; 83 Am. Dec. 593.

WESTERN LUNATIC ASYLUM v. MILLER.

[29 WEST VIRGINIA, 323.]

STATUTES OF LIMITATIONS RUN AGAINST PUBLIC CORPORATIONS, whether they are municipal or mere agencies of the state. Such corporations are more or less branches of the government, and necessarily clothed with the attributes and incidents of sovereignty; yet when they have power to sue and be sued, to have a common seal, to take and hold property, and transact business, they are governed by the same laws and regulations, and subject to the same limitations, as natural persons.

STATUTES OF LIMITATIONS OPERATE AGAINST ONE STATE WHEN SUING IN THE COURTS OF ANOTHER STATE.—If a sovereign state enters the courts of a foreign state, she does so with no other rights and immunities than those which pertain to private corporations or individuals.

THERE CAN BE NO DECREE BETWEEN CO-DEFENDANTS, or recovery by one co-defendant against the other, when complainant is entitled to no relief.

STIPULATION OR AGREEMENT REGARDING THE DISPOSITION OF A CAUSE will not be permitted to affect the rights of persons who are not parties to it nor to the action.

J. F. Brown and Z. T. Vinson, for the appellant.

B. Brown and J. W. Ferguson, for the appellee.

SNYDER J. In the year 1850, William Irby, a lunatic from Cabell County, was taken to the Western Lunatic Asylum, at Staunton, Virginia, where he remained as a patient until his death, in the year 1863. Peter C. Buffington was appointed committee of the estate of Irby, and in 1854 brought suit in the circuit court of Cabell County for the sale of his ward's lands in that county, alleging in his bill that the lands were unproductive, and a sale and investment of the proceeds would be advantageous to the estate, and also that a portion of said proceeds were necessary to pay the debts and the expenses of his ward at the asylum. The presumptive heirs of Irby were made defendants to the bill. Under decrees in said suit, the lands were sold and the sales confirmed. A small part of the proceeds was applied to the payment of debts, \$950 was paid to the asylum on account for the support of Irby, and the residue, \$905, was placed in the hands of W. C. Miller, as the general receiver of the court, who was, by decree entered September 1, 1859, ordered to "continue to invest the same in some safe stock or loan until the further order of the court." In November, 1868, an order was entered, directing deeds to be made to the purchasers of the lands, which concludes with the words, "and this cause is filed away." This is the last order or proceeding had in this cause, so far as the transcript before us discloses.

In January, 1878, the Western Lunatic Asylum, styling itself a corporation created and existing under the laws of Virginia, and doing business at Staunton, in that state, brought this suit in the circuit court of Cabell County, against W. C. Miller, the general receiver of said court, and the administrator and heirs of Irby, to recover \$2,383.45, balance alleged to be due to the plaintiff from the estate of Irby for his board, clothing, etc., furnished at the asylum, from November, 1850, to March, 1863, and to obtain a decree against said Miller, as receiver, for the aforesaid \$905, and the interest thereon.

George F. Miller, the administrator of Irby, pleaded the statute of limitations, and filed an answer in the nature of a cross-bill, asking for a decree in his favor for said \$905.

W. C. Miller, the receiver, answered, alleging that he had paid over the \$905 placed in his hands to the heirs of Irby, and exhibited receipts showing that he had so paid over a part of said fund; and he also pleaded the statute of limitations and the lapse of time as a bar to any recovery against him.

In March, 1884, the state of West Virginia filed her petition, claiming said fund, as the assignee of Virginia, under the act of February 3, 1863, passed by the reorganized government of Virginia: Acts 1862-63, p. 58.

The cause was referred to a commissioner, who reported the balance in the hands of the general receiver, after deducting the amounts paid by him to the heirs of Irby, to be \$1,106.84, as of May 7, 1882. To this report there was no exception.

The court, on August 19, 1884, entered a decree in favor of the administrator of Irby against W. C. Miller, the receiver, for the balance reported by the commissioner in his hands, and then decreed that said administrator, after paying the costs of this suit, should pay the residue of said fund to the plaintiff on its claim against the estate of Irby, which, with the interest thereon to the date of the decree, was ascertained and fixed at \$5,023.41, and found to be the only indebtedness of said Irby's estate. From this decree George F. Miller, administrator, obtained this appeal.

The first question presented is, whether or not the plaintiff's demand is barred by the statute of limitations. The plaintiff is a Virginia corporation, with perpetual succession, capacity to sue and be sued, a common seal, and the power to take and hold real and personal property: Acts 1841, c. 15, p. 38; Code Va. 1849, c. 85, sec. 182, p. 389.

If this is simply a public charitable institution, and not a

part of the government itself, then the statute of limitations applies to it in the same manner that it does to individuals. The maxim, *Nullum tempus occurrit regi*, applies to sovereignty alone: *Wheeling v. Campbell*, 12 W. Va. 38; *Forsyth v. Wheeling*, 19 Id. 318.

Public corporations, whether they are municipal or mere agencies of the state, are all more or less branches of the government, and necessarily clothed with attributes and incidents of sovereignty; yet when they are clothed with the capacity to sue and be sued, to have a common seal, to take and hold property and transact business, they are governed by the same laws, rules, and regulations, and subject to the same limitations, that natural persons are, except so far as they may be exempted or relieved by positive law: *Tompkins v. Kanawha Board*, 19 W. Va. 257.

But conceding, as claimed by the plaintiff, that this corporation and the commonwealth of Virginia are one and the same, and that it must be treated here as possessing all the attributes and immunities which belong to the sovereign commonwealth of Virginia, still, when Virginia seeks redress, and becomes a suitor in the courts of this state and beyond her territorial limits, she must lay aside her attributes and immunities of sovereignty, and assert her demands as private individuals or corporations assert theirs in those courts, subject to the same laws and limitations. Sovereignty, though supreme within its own jurisdiction and territory, does not extend beyond these; and when a sovereign state enters the courts of a foreign state, she does so with no other rights and immunities than those which pertain to private corporations or individuals: *Esley v. People*, 23 Kan. 202. The *lex fori* governs in the limitation of actions: *Johnson v. Anderson*, 76 Va. 766.

But it is contended by the attorney-general for this state that by the act of the general assembly of February 3, 1863, Virginia transferred her claim against the estate of Irby to this state: Acts Va. 1882-83, p. 58; *Caldwell v. Prindle*, 19 W. Va. 604.

It is not necessary to decide whether or not such transfer has been made, because such decision could not affect the result of the suit. Conceding the transfer was made, this state is not entitled to any relief in this suit: 1. Because she did not bring the suit, and is not a plaintiff therein; and 2. Because by statute, which went into effect April 1, 1869, the bar

of the statute of limitations is expressly made applicable to demands due the state: Code, c. 85, sec. 20, p. 221. It is not overlooked that this statute was repealed in the act of December 20, 1875, chapter 55, section 19, acts of 1875, page 125, and re-enacted in the act of February 9, 1882, chapter 18, section 20, acts of 1882, page 25. The said statute was therefore in force from April 1, 1869, to December 20, 1875, more than six years, and has continued in force since February, 1882.

William Irby died at the asylum in Staunton in March, 1863, but so far as the record here shows no one was appointed administrator of his estate until September, 1877, when the same was, by an order of the circuit court of Cabell County, committed to the appellant, George F. Miller, the then sheriff of said county.

The account of the plaintiff is for board, etc., at the price of seventeen dollars per month. It is plain, therefore, that the whole of the account, except, perhaps, for the last month, accrued in the lifetime of Irby, and the statute of limitations commenced to run in his favor before his death, and became barred in five years thereafter, excluding the time excepted by the law from the operation of the statute: *Jones v. Lemon*, 26 W. Va. 629.

But let us assume, though such an assumption is scarcely admissible in any view of the facts in this cause, that the plaintiff's cause of action did not accrue until after the death of Irby, and that no one became his administrator until more than five years from that time. In such event, the statute of limitations would commence to run at the expiration of five years from the death; that is, the law, according to our statute, conclusively presumes that an administrator has qualified on the last day of said five years: Code, c. 104, sec. 17.

Irby died, as we have seen, in March, 1863; the statute commenced, therefore, to run against the plaintiff, whether it be treated as a public corporation or the commonwealth of Virginia herself, from March, 1868, and the statutory bar applicable to such claims as the one here asserted being five years, the demand became absolutely barred in March, 1873. This suit was not commenced until 1878, nearly five years after the bar had become complete. But if we treat the state of West Virginia as the plaintiff and owner of the claim, the statute began to run as to her April 1, 1869, and her right of action ceased and the bar of the statute became operative in April, 1874, before the repeal of the statute barring claims

due the state. For these reasons, it seems to me plain that the plaintiff, when this suit was instituted, had no existing legal demand against the estate of Irby, and that its bill should have been dismissed by the circuit court.

It is, however, asserted here for the plaintiff that the fund in the hands of W. C. Miller, the general receiver of the court, is a trust fund, dedicated by the proceedings in the aforesaid suit of *Buffington v. Irby* to the payment of the plaintiff's demand. There is nothing in the transcript of the record of that suit or of this to warrant any such claim. But if such had been the fact, the proper place to call for the fund would have been in that suit, and not in this independent and collateral suit.

It thus appearing that the plaintiff is not entitled to any relief, it is well settled that there can be no decree in the suit between co-defendants, or recovery by one defendant against another: *Hubbard v. Goodwin*, 2 Leigh, 492; *Hansford v. Coal Co.*, 22 W. Va. 70; *Vance v. Evans*, 11 Id. 842; *Ould v. Myers*, 23 Gratt. 383.

To escape this rule of law, we are referred to the counsel for the plaintiff and by the attorney-general of this state to the following recital in the decree appealed from: "The plaintiff and George F. Miller, administrator of William Irby, deceased, the state of West Virginia, and the defendant, W. C. Miller, by their respective counsel, agree that if anything should be found due from the said W. C. Miller to any of the parties to this suit, the court shall adjudicate such indebtedness, and to whom the same is due, whether the plaintiff herein has any cause of action or not."

This agreement or consent seems to have been entirely with reference to the decision of the circuit court, and not as an agreement in the cause to extend to the appellate court. If it had been acted on by the circuit court, we might consider it in reviewing the decree of that court; but as the decree is not based on or influenced by the agreement, I have grave doubts whether or not we ought to give it any effect in this court. But be this as it may, the consent can affect only those who assented to it. The heirs of Irby are the parties who appear to be entitled to the fund, and neither they nor their counsel have assented to the agreement. The fund is the proceeds of real estate sold under the provisions of chapter 128, code of 1849. By section 12 of said chapter, it is declared that, upon the death of the lunatic, the proceeds of such sale

shall "pass to those who would have been entitled to the land if it had not been sold or divided": *Vaughan v. Jones*, 28 Gratt. 444.

Under this statute, the fund passed by descent to the heirs of Irby just as the land would have done had it not been sold. The heirs, then, are the parties materially interested, and they have not united in the agreement, or consented to any deviation from the due course and regular determination of this suit.

Of course W. C. Miller, holding the fund as receiver and trustee, cannot be protected by the statute of limitations. He is the mere hand of the court, holding the fund subject to its order, without any right to or personal interest in it. The heirs of Irby may, by petition filed in the suit of *Buffington v. Irby*, or otherwise, call upon the court in that cause to order the said receiver to render an account of the fund and have it paid over to them, or otherwise disbursed as may be legal, according to the rights of those entitled thereto. That suit does not appear to have ever been dismissed; but even if it had, I apprehend it would still be legal and proper for the court to summon the parties before it and dispose of the fund in the hands of the receiver belonging to the suit and paid over to him under orders entered therein, with directions to invest or retain it until the further order of the court. The power to do so seems to be a necessity, for otherwise it might be difficult to control and disburse the fund.

For the foregoing reasons, I am clearly of opinion that the decrees of the circuit court entered in this cause should be reversed, and the plaintiff's bill dismissed, with costs to the administrator of Irby against the plaintiff in both courts.

STATUTES OF LIMITATION DO NOT OPERATE AGAINST THE SOVEREIGN, NOR AGAINST A STATE suing within its own courts, unless the statute is so drawn as to unmistakably indicate that the state has waived its attribute of sovereignty, and consented to be bound by the statute: *People v. Herkimer*, 4 Cow. 345; 15 Am. Dec. 379, and note 380-383. But public and municipal corporations are so vested with the rights and privileges of sovereignty as to be within the protection of this rule; statutes of limitations affect them the same as private persons: *City of Cincinnati v. First P. Church*, 8 Ohio, 298; 32 Am. Dec. 718, and note 719-721; *City of Fort Smith v. McKibbin*, 41 Ark. 45; 48 Am. Rep. 19, and note 24-38.

WHITE v. FOOTE LUMBER AND MANUFACTURING COMPANY.

[29 WEST VIRGINIA, 385.]

AN EXECUTION GARNISHMENT MUST BE SUPPORTED BY A VALID JUDGMENT. A VOID JUDGMENT CANNOT BE REGARDED AS HAVING ANY LEGAL EXISTENCE in any court, for any purpose.

JUDGMENT AGAINST A MARRIED WOMAN on a contract made while she is living with her husband is absolutely void, and can create no lien on her separate estate.

IF A MARRIED WOMAN IS DOING BUSINESS UNDER A COMPANY NAME, a judgment against her by such name is not less invalid than if entered against her by her proper name.

PRESUMPTION IS THAT A MARRIED WOMAN IS LIVING WITH HER HUSBAND; and this presumption, unless removed by competent evidence, will overthrow, even on a collateral assault, a judgment entered against her during her coverture.

Simms and Enslow, for the plaintiff in error.

E. S. Doolittle, for the defendant in error.

SNYDER, J. A. G. White, on May 19, 1885, caused a suggestion to be issued by E. M. Underwood, a justice of the peace of Cabell County, in which, after stating that said White, on December 13, 1883, had obtained a judgment before another justice of said county against the Foote Lumber and Manufacturing Company for \$139.42 and costs, and that there was a liability on Gard and Lous by reason thereof, commanded the said Gard and Lous, as debtors of said company, to be summoned to appear before said Underwood on June 1, 1885, to answer respecting said liability. The suggestion was duly served on Gard and Lous. On the return day thereof, Jane M. Foote, the wife of H. L. Foote, appeared before the justice by her attorney and filed a plea, in which she alleged that the alleged judgment on which the suggestion had issued had been recovered against her under the name of the Foote Lumber and Manufacturing Company, that being the name under which she was doing business; and that at the time of the rendition of said judgment she was and still is a married woman, the wife of H. L. Foote, and living with her husband. Issue was joined on this plea, and the justice having, upon the evidence, found for the plaintiff, and that Gard and Lous were indebted to the defendant for a sum in excess of the plaintiff's judgment, gave the plaintiff judgment against Gard Lous for \$139.42 and costs. Within ten days thereafter, the said Jane M. Foote appealed from said judgment to the circuit court of said county.

The case was finally heard by the circuit court on March 25, 1886, where both the law and the facts were submitted to the court, and the judgment of the justice was affirmed. The garnishees, Gard and Lous, and Jane M. Foote, as the Foote Lumber and Manufacturing Company, obtained a writ of error to said judgment from this court.

All the facts proved on the trial in circuit court are certified and made part of the record. The material facts are as follows: The garnishees, at the time the suggestion was served upon them, had in their hands funds belonging to the Foote Lumber and Manufacturing Company sufficient to pay the plaintiff's judgment and costs. Jane M. Foote composed the said Foote Lumber and Manufacturing Company, and did business under that name through her husband, H. L. Foote, as her agent; and she was a married woman.

It is contended by the plaintiff in error, Jane M. Foote, that in order to entitle the plaintiff below to subject the effects of a judgment debtor to the satisfaction of the claim, it is requisite that the creditor should show: 1. A valid and subsisting judgment against the debtor; 2. An execution upon the judgment in the hands of an officer; and 3. Funds or effects of the debtor not exempt from the lien of the execution in the hands of the garnishee sufficient to satisfy the execution in whole or in part. It is claimed that no one of these requisites was shown by the evidence in this case. The main contention, however, for the plaintiff in error is, that the alleged judgment being against a married woman, was void, and therefore could not be either the basis of an execution or of a suggestion.

Ordinarily, it is not necessary for the creditor, in a proceeding by suggestion, to offer in evidence the judgment against his debtor: *B. & O. R. R. v. Wilson*, 2 W. Va. 528. Upon suggestions in the circuit court, it is essential to show that a writ of *feri facias* has been issued, and placed in the hands of the officer for execution, in order to create the lien required by the statute as the foundation of the suggestion: Code, sec. 10, c. 141. But our statute in respect to suggestions before a justice is not explicit on this subject; but the reason of the law seems to be that the execution should be shown, for otherwise there could be no lien on the effects or funds in the possession of the garnishee. But be this as it may when the validity or legal existence of the judgment is directly assailed by the debtor, I think there can be no serious doubt that it devolves on the plaintiff to show the existence of his judg-

ment. I do not mean to decide that he must produce a judgment which cannot be reversed for some irregularity or error which does not render it void, but that he must show a judgment which cannot be assailed and held absolutely void in a collateral proceeding. If the judgment is void, it cannot be regarded as having any legal existence in any court or for any purpose.

It is important, then, to inquire whether the judgment on which the suggestion and judgment against the garnishees in this case was based was or was not absolutely void. If it is a judgment against a married woman upon a contract made during her coverture, it is absolutely void, and is in effect the same as a judgment rendered by a court having no jurisdiction. It is an absolute nullity, and creates no lien on the separate estate of the woman: *Tavener v. Barrett*, 21 W. Va. 658; *Stockton v. Farley*, 10 Id. 171; *Carey v. Burreas*, 20 Id. 571.

The decision of the case before us depends upon whether or not the judgment on which the suggestion is founded is a judgment against a married woman rendered upon a contract made during her coverture. This is purely a question of fact. It is certified as a fact that the Foote Lumber and Manufacturing Company is Jane M. Foote, doing business in that name. It is also certified that Jane M. Foote was a married woman. The judgment is against the Foote Lumber and Manufacturing Company. These facts taken together are, it seems to me, the same in effect as a certificate that the judgment was rendered against Jane M. Foote, a married woman. This much, I think, is entirely plain. But it is insisted it is not shown that Jane M. Foote was a married woman at the time the contract was made on which the judgment was obtained, and further, that it is not shown that she was then living with her husband. It has been expressly decided by this court that, under our statute, section 13, chapter 66, of the code, a married woman living separate from her husband may contract and be sued, and a valid judgment may be rendered against her, upon her contracts, in a court of common law: *Peck v. Marling*, 22 W. Va. 708. But when it is pleaded or shown that the defendant is a married woman, the burden is cast upon the plaintiff to establish the fact that she is living separate from her husband. The presumption is, that all married women live with their husbands, and the fact that some do not is an exception; therefore he who claims the benefit of the exception must show it: *Stockton v. Farley*, 10 W. Va. 171; *Peck v. Marling*, *supra*.

The judgment in this case being against the Foote Lumber and Manufacturing Company, the contract on which it is based was necessarily made by said company; and it being certified that Jane M. Foote, a married woman, and said company are one and the same, it inevitably follows that the contract was made with a married woman. It also follows, it seems to me, that the contract must have been made during the coverture of Jane M. Foote. It is certified that Jane M. Foote is the Foote Lumber and Manufacturing Company. This is equivalent to a certificate that the said company is a married woman; and there being no pretense that the company had any existence, or that Jane M. Foote did business under that name at any time when she was not a married woman, the necessary conclusion both in law and fact is, that the contract was made during coverture. My conclusion, therefore, is, that the judgment having been rendered upon the contract of a married woman made during her coverture, it is an absolute nullity, and that any execution or suggestion sued out upon it was invalid and ineffectual for any purpose: *Whitley v. Black*, 2 Hawks, 179; 11 Am. Dec. 753, 755, note.

The result, therefore, is, that the judgment of the circuit court, as also that of the justice, must be reversed, and the plaintiff's suggestion dismissed.

JUDGMENTS AGAINST MARRIED WOMEN—The doctrines of the principal case prevail in a few of the states only. The general rule upon this subject is, that married women, as well as all other residents, are within the jurisdiction of the courts, and judgments against them are valid: See *Freeman on Judgments*, sec. 150, and note to *Caldwell v. Walters*, 55 Am. Dec. 599-611.

HALLIDAY v. MILLER.

[29 WEST VIRGINIA, 424.]

PARENT AND CHILD.—**FATHER IS ENTITLED TO LABOR AND SERVICE OF HIS MINOR CHILD, AND MAY MAINTAIN AN ACTION** to recover for the services of such child rendered to any third person. It seems that marriage of the child without the father's assent will not impair his right to recover for its services.

FATHER MAY VOLUNTARILY RELINQUISH HIS RIGHT to his child's earnings; and when he does so, his child is said to be emancipated. The emancipation may be parol or in writing, or may be inferred from circumstances.

INSOLVENT FATHER HAS THE RIGHT TO EMANCIPATE HIS SON, and to relinquish all claim to the latter's earnings.

CONVEYANCE BY FATHER TO SON, IN CONSIDERATION OF MONIES RECEIVED FOR THE EARNINGS OF THE SON WHILE HE WAS AN UNEMANCIPATED MINOR, is without valid consideration, and therefore fraudulent and void as against the creditors of the father.

A MINOR IS ENTITLED TO RETAIN FOR HIS OWN USE HIS BOUNTIES AND PAY AS A SOLDIER; and if they are received by his father, the latter becomes indebted to his son for the amount thereof, and may, to discharge such debt, convey real property to the son. Such conveyance is not voluntary, and cannot be avoided by the father's creditors.

BILL by Halliday against George S. Miller and Bartley F. Miller, his son, to set aside conveyances made by the father to the son. It appeared that the consideration for these deeds was moneys received by George S. Miller from his son, and to which the son had become entitled while a minor for bounties and pay when in the service of the United States as a soldier during the war of the Rebellion. A decree was entered denying the relief sought by complainant.

W. H. Harvey, for the appellant.

V. S. Armstrong, for the appellee.

GREEN, J. Upon the question of fact which has been raised in this case, whether the defendant B. F. Miller was a minor when he served in the army of the United States, I think there can be no reasonable doubt. He himself, in his deposition taken on the 1st of June, 1882, states that he was then thirty-eight years old. He must, therefore, have been less than seventeen in the spring of 1861, when he says he enlisted, and the whole of his military service was rendered while he was a minor. This is further proved by his own statement of his age, made when he obtained his marriage license. This evidence greatly outweighs that of his father, the only witness who says he was of full age when he enlisted. He states that his son did not enlist till the 23d of November, 1861, six months latter than the date of enlistment stated by his son. He says his son was born in September, 1841 or 1842, which would make him a little over twenty or twenty-one in November, 1861, when he says his son enlisted. I have no doubt the statement of the father was false, and that he knew it to be false. He says that the date of his son's birth and of his enlistment are recorded in the family Bible. If so, by producing the Bible he could have proved the age of his son beyond dispute; but, though requested, he refused to produce it. I shall therefore consider the case as though it was proven

that all the military service of the son was rendered while he was a minor.

An effort was made to show that the reputation of the father for veracity was such that he ought not to be believed on oath; but the effort failed. The record in the case, however, shows that his evidence is entitled to very little consideration, and when unsupported by other evidence, it ought to be disregarded. He not only made a false statement in reference to the age of his son, but many of his other statements are unworthy of belief, and should be disregarded. His statement, for instance, that his son bought the first piece of land, for which he made him a deed on October 25, 1870, in the year 1863, ought not to be believed. This parcel of land contained 162 acres, all in woods. Why his infant son serving in the army should buy such a piece of land and pay for it cash \$425 cannot be easily explained. This statement is not corroborated by the son. He testifies that he bought this land in 1870, and paid \$425 for it. The deed bears date October 25, 1870. He was married in September, 1867, and it is much more probable that he bought the land in 1870, after his marriage, and after a house had been built on it, in which he was living, than in 1863, when he was a boy in the army. The statement of the father that he did not give his son a deed for this land for so many years through carelessness, and because he was waiting for a lawyer, does not satisfactorily account for the long delay. The fair inference from all the evidence is, that the father, having received all, or nearly all, of the bounties and pay as a soldier of his infant son, and being involved in debt, years afterwards conveyed to his son this land as a compensation for said money. The evidence shows that the land, at the time it was conveyed to the son, was not worth more than the money given by him to his father with the interest thereon up to that time.

It is insisted that, the son being a minor when this money was earned by him, it all belonged to his father, and when he received it from his son, he received it as his father, and as the person entitled to it; and the subsequent conveyance of this land, without any consideration other than this money, when he was insolvent, must be regarded as voluntary and fraudulent as against the plaintiff at least, a creditor when these voluntary deeds were made. It would seem to be almost universally admitted that the father is entitled to the value of his minor child's labor and service: *Day v. Everett*, 7

Mass. 145; *Plumber v. Webb*, 4 Mason, 350; *Gale v. Parrott*, 1 N. H. 28. None have ever disputed that this absolute right of the father to the child's labor extends till the child is fourteen years old. But the authorities very generally, and it seems to me justly, extend this right of the father through the whole minority of the child; that is, till he reaches the age of twenty-one, when the child is legally emancipated from the father's control. This seems to me but reasonable, as thereby the law sets off some years when the child may be useful against many preceding years when he is entirely helpless and a charge upon the father. This right of the father to his minor child's services is well illustrated by the following cases, which bear more or less resemblance to the case before us:—

In *Monaghan v. School District*, 28 Wis. 104, Cole, J., says: "Is there any difficulty in the way of the father maintaining this action? The daughter was employed by the officers of the district to teach a district school. A written contract was entered into, by which it was agreed she should teach the school for four months, and should be paid twenty-five dollars a month for her services. The father was present when the contract was entered into, and assented to his daughter entering into it. The contract has been performed on her part. But it is claimed that, by the school laws, a minor is competent to contract as a school-teacher, and therefore such contract may be enforced by the minor the same as by an adult. It is conceded that the parent has the right to prevent his minor child from teaching; but, assenting to her teaching, he, it is argued, must be held to the assent to the contracting, with all its legal consequences. This is the argument. Is it satisfactory? Does it follow that because the parent assented to this employment he emancipated the child, and relinquished his claim to her wages? . . . It appears that the daughter is about sixteen years of age, and the father was charged with certain duties in respect to her, as education, support, and protection. And as some compensation for these duties, he has a right to claim her earnings, and there is no substantial objection to his maintaining this action. We are quite clear that the recovery will bar any further action by the minor."

In the case of *White v. Henry*, 25 Me. 531, it was decided that a minor was not emancipated by a marriage without the father's consent; and the son, having so married and gone to

sea, being employed by one who knew he was a minor but married, the father can recover from such employer the wages earned by such son. The court say: "The father has in no way consented he should have his earnings, but has always been ready and willing to support him. The defendants, knowing he was a minor, without the knowledge or consent of the father, employed him, and have paid him his wages in full. To allow the defense would hold out encouragement to sons impatient of parental control to resist the reasonable authority of their fathers, and give the latter little means to secure their own legal rights beyond physical restraint." The plaintiff was given judgment against the defendants for three months and twenty days' wages, at the rate of fourteen dollars per month, and interest.

In *Week v. Holmes*, 12 Cush. 215, where a minor shipped on a whaling voyage without his father's consent, it was held the father could recover of the employer the fair share, or lay, as it is called, of the voyage, — that is, one per cent of the earnings of the voyage. In *Bishop v. Shepherd*, 25 Pick. 492, it was decided that where a minor shipped as a seaman in a whale-ship without his father's consent, and deserted in the course of the voyage, whereby his share of earnings, according to the custom in such cases, was forfeited and inured to the benefit of the ship-owner, the father could sue the ship-owner for the value of his son's services and earnings upon an implied contract, if he repudiated the contract of the son, as he had a right to do. The services due in this case were for three years.

If the Wisconsin decision be sound law, and it seems to me it is, then it would be unimportant, in cases like those cited above from the Maine and Massachusetts reports, whether, when the son shipped as a seaman, being a minor, he did so with or without his father's consent. In either case, the father could recover the son's wages under the contract for the voyage. The only difference is, that if the minor son shipped as a seaman without his father's consent, the father could repudiate the son's contract, and recover for the value of his son's services without regard to the contract. But if the son shipped with the father's consent, the father could recover only such pay as under the contract the son, if he were of age, could recover. But it is universally agreed that the father may voluntarily relinquish his child's earnings though he be a minor, and allow him to earn for himself, and receive and

appropriate his own earnings at his pleasure. Such an arrangement between a father and his minor son is called an emancipation of the son. By such agreement the son is put as to his services on the same footing as if he had attained the age of twenty-one years, when the law would emancipate him. Such emancipation by the father may be parol or in writing, and it may be proved by circumstantial evidence, or it may be implied. There are some cases which seem to proceed on the idea that an emancipation may arise without the father's agreement as the result of his failure to perform his obligations as a father, or his inability to do so. But it does seem to me this is not a correct principle: See *Woods, J., in Jenness v. Emerson*, 15 N. H. 489. But the right of a father to emancipate his minor son is unquestionable, and this right exists though the father be insolvent: *Campbell v. Cooper*, 34 Id. 49; *Cloud v. Hamilton*, 11 Humph. 104; 53 Am. Dec. 778; *Armstrong v. McDonald*, 10 Barb. 300; *Atwood v. Holcomb*, 39 Conn. 270; 12 Am. Rep. 386; *Lackman v. Wood*, 25 Cal. 147; *McClaskey v. Cyphert*, 27 Pa. St. 225; *Dersker v. Hess*, 54 Mo. 250; *Hall v. Hall*, 44 N. H. 293; *Chase v. Elkins*, 2 Vt. 290; *Winchester v. Reed*, 8 Jones, 377.

There are two decisions which I have seen in which the facts resemble the case before us, but which differ from each other because of a diversity in the facts of the two cases. Both the decisions seem to be correct; and a statement of the character of these two cases, and careful observation of the diversity between them, which led to opposite decisions, will, I think, aid us in reaching a correct conclusion in this case.

The first of these cases is *Winchester v. Reed*, 8 Jones, 377. In this case the minor son had worked in a gold mine for some two or three years at from seventy-five cents to a dollar per day, and he had no other property but these earnings, which at the time he became twenty or twenty-one years old amounted to a considerable sum. The father, being at that time insolvent, made a deed to his son for a tract of land worth three hundred or four hundred dollars, for which the son paid him down in cash two hundred and fifty dollars and his note for fifty dollars, the residue of the purchase-money. Pearson, C. J., delivering the opinion of the court upon the question whether or not the deed was fraudulent, says: "A father is entitled to the services of his son till he arrives at the age of twenty-one: *Musgrove v. Kornegay*, 7 Jones, 71. It is true, a creditor cannot make his debtor work

to pay his debt, nor can he force him to make his children work, or sell under execution the valuable interest which a father has in the services of his child, or which a master has in the services of an apprentice. But if in fact a child does work and earn wages, the proceeds of his labor belong to his father, and if the father invests the money so earned in the purchase of land, taking the title in the name of the child, the father being insolvent, his creditors can subject the land to the payment of their debts: *Worth v. York*, 13 Ired. 206. Therefore when the son worked at the gold mine, his wages belonged to his father, and he was bound as an honest man to have taken the money and applied it to the payment of his debts instead of attempting, under the color of this money, which was his own, to pass his land into the hands of his son. . . . The deed is voluntary, and void against creditors."

The appellant insists that the case before us is substantially like the above; and it is, unless there is a distinction between wages paid to a minor for working in a gold mine, and bounties and pay for the military services of a minor in the army of his country. Whether this would make any difference we shall presently see.

The other case to which I refer is *Jennett v. Alden*, 12 Mass. 385. The facts in this were as follows: "When the son was about fourteen years old, his father told him he might go to sea, and he—the father—would give him his time, or all that he should earn, till he should be twenty-one years of age. The son accordingly went to sea, and has followed that course of business ever since. The father, at different times, received the wages earned by his minor son. When the son was about nineteen years of age, the father caused to be executed to him a deed for eighteen acres of land, which the father bought and paid for, being then in good credit and not involved, though he owed one debt to one Church. No account was kept of the wages of the minor son received by the father before this deed was made; but it was believed to be equal to the value of the land when so conveyed to the son, and it was intended as a compensation for the wages of the son so received from time to time before that by the father. The father afterwards became insolvent; and the court held that this was not a voluntary conveyance to the son, and was not fraudulent as to Church's debt, which was existing when the deed was made to the son. Parker, C. J., said: "It appears there was an equitable consideration subsisting between the father and

the son, the former having received the earnings of the latter, an agreement having been entered into by the father that the son should enjoy the fruits of his own labor, although not of age to be emancipated. The agreement was a lawful one; and the money received by the father from the earnings of the son may be equitably considered the money of the son, which, if he could not obtain it by coercion, was yet a good and valuable consideration for any promise from the father, and would fully justify the consideration in this deed as paid by the son."

The facts in the above case resemble much the facts in the case before us, except in the important particular that in this case there is not the slightest evidence of an emancipation, and no reason to believe that, before the earning of the pay and bounties for military services, there was any agreement between the father and son that the son should enjoy the fruits of his service in the army, though he was a minor. It is obvious that but for the agreement made before the wages were earned the decision in the case above would have been different, and the deed to the son would have been declared voluntary, and therefore fraudulent as to the existing creditors of the father. And such must be our decision on these authorities in this case, unless a distinction exists between wages earned by a minor while serving as a seaman in a private mercantile vessel, and pay and bounty earned by a minor while serving as a soldier in the army of his country, so that the determination of this case must depend upon whether there be such a distinction.

The father is clearly entitled to the wages of his infant son serving in a mercantile vessel owned by a private individual, except when he has, before the wages have been earned, agreed that the son might have all the wages he so earned. But it does not follow that a father is entitled to all the pay and bounty received by his minor son while serving in the army and navy of his country as a soldier with the father's consent, though the father never agreed with the son, before such services were rendered, that he should have either the pay or the bounty. If, in such a case, the father is not entitled to the pay and bounty, then the decision of the circuit court in this case, that the deeds from the father to the son were made for a valuable consideration, and were therefore not fraudulent and void as to the father's creditors, must be sustained. Otherwise, it must be reversed.

The oldest case on this subject which I have seen is an English case: *Carson v. Watts*, 3 Doug. 350. This was a suit brought to recover a minor's share of a prize taken by a privateer vessel during a war. It was brought by the administration of the minor sailor against the owners of the privateer, and the question involved was, whether the minor's share of the prize-money belonged to him or to his master. The minor, during all the time he served in the privateer, was an apprentice as a mariner, and his master received the wages due him for two voyages the minor had made, and now claimed the prize-money which was coming to this minor, his apprentice. The following were the opinions of the judges: —

Willis, J.: "I think the master is entitled to all the wages or money freely acquired by the apprentice as for labor or service; but to any extraordinary gains he may acquire out of the usual course of his service, I think the master not entitled. Suppose in case of a wreck at sea an apprentice by any exertion of his own had recovered part of the wreck from a ship stranded, would the master be entitled?"

Lord Mansfield: "It is very extraordinary that no case has occurred since 1747. I did think it had been decided. Upon the first argument, I thought it clear that whatever an apprentice who runs away gains in another service *eo nomine* belongs to the master, and is earned for him; and if it is anything specific, the master may bring trover for it. I could see no distinction in the case of a privateer or letter of marque between wages and prize-money, which is in lieu of wages. In men-of-war there is a difference. This is not like the case of extraordinary gain, as the instance put of treasure-trove, recovery of wreck, etc.; for that is no remuneration for services. But I am now struck very much with the usage, and am unwilling to go against it. We must take the usage to be as stated by Mr. Wood [this usage was, that the apprentice should have the prize-money and the master the wages], and I think it ought to decide."

Buller, J.: "Independently of statutory regulations, the prize-money was as much a bounty of the crown on board privateers as on board king's ships. There does not seem much difference in the case from that circumstance. I rather incline to the opinion that the apprentice is entitled to the prize-money acquired."

The next oldest case I have seen is *United States v. Bainbridge*, 1 Mason, 71, decided in 1816. Judge Story, in the

opinion in this case, on page 84: "All the acts, from the first establishment of the navy, authorize the employment of midshipmen (who are invariably minors when they enter the service), and all the acts since the statute of June 30, 1798, chapter 81, including those now in force, and under which the present applicant has been enlisted and held in service, in express terms authorizes the President to engage and employ boys in the ordinary duties of the navy. In no one of them is there any provision requiring the consent of parents or guardians to their engagement or authorizing them to make it. The laws manifestly contemplate that it is a personal contract made by the infants themselves, for their own benefit. They are entitled to the pay, the bounties, and the prize-money earned and acquired in the service. . . . To suppose that the legislature meant to authorize an infant to enlist in the navy, yet the contract should be voidable at his election, would be to suppose that it meant to repeal the rules and articles of the navy in his favor, and enable him to desert when his services were most important to the public."

In *Mears v. Bickford*, 55 Me. 528, it was decided that, "upon a contract made with his father's consent between a minor and the defendant to enlist as a substitute, the father cannot maintain an action in his own name. This bounty money is a gift to the person enlisting, and not wages; and it belongs to the minor, and not to his father or master." The court says, on page 529: "It has been held in *Banks v. Conant*, 14 Allen, 497, that a bounty paid by the national government, or by a state, city, or town, to a child or apprentice upon his enlisting in the military service of the United States, belongs to him, and not to his father or master."

In *Kelly v. Sproul*, 97 Mass. 169, it was decided that bounty money, to which a minor becomes entitled upon his enlistment as a soldier, belongs to him, and not to his master; and that an agreement to give his military bounty to his master for permitting him to enlist was voidable by the apprentice on the ground of infancy. So, too, money paid to the minor for his enlistment as a substitute is to be regarded in the nature of bounty money, and belongs to the minor: *Taylor v. Mechanics' Savings Bank*, 97 Id. 345.

In the case in 14 Allen, a distinction is taken between bounty money, which is regarded as a gift by the government, and the regular pay of the soldier, which is regarded as pay for services rendered. It seems to me that there is now well-

grounded distinction between the two. In time of war, the government has a right to demand military services of its citizens, whether adults or minors; and it may compel the services of both minors and adults. It itself fixes the price it will pay for such services. It seems to me, therefore, that this sovereign power of a government to require the military services of an infant citizen in time of war on what terms it pleases renders the regular pay as much a gift or bounty as what is paid to induce a citizen to volunteer. It is all to be regarded in the same light as bounties, and not as pay for services. The sovereign power of the state supersedes the rights and powers of a father over his infant child in such a case. And as it may require the military services of the infant in a war without any compensation, so it may fix what his compensation shall be. And if the state fixes the bounty to be paid, and the regular pay of the soldier, and directs it to be paid to the soldier who volunteers, whether a minor or an adult, no other person, in case the soldier be a minor, can claim such bounty or pay, whether or not the minor has been emancipated by his father or master. The minor's right to receive such pay or bounty does not arise from his having obtained the consent of his father to receive it, but from the better reason that his sovereign state has directed it to be paid to him personally.

I am therefore of opinion that, in this case, Bentley F. Miller, though a minor when he received his bounties and pay as a soldier, was entitled to retain them as his own; and his father having received such bounty and pay as a soldier, thereby became indebted to his son; and as the amount of this indebtedness, with interest, exceeded the value of the land which his father conveyed to him, such conveyances cannot be regarded as voluntary, and fraudulent against the plaintiff, a creditor of the father. This case, on this view of the law, becomes very like the case of *Jennett v. Allen*, 12 Mass. 385; and the principles on which the deed to the son in that case was decided to be not fraudulent and void must control in this case, and require us to hold the two deeds from the father to the son as made for a valuable consideration, and not fraudulent.

For these reasons, the decree of the circuit court appealed from must be affirmed; and the appellees must recover of the appellant their costs in this court expended, and thirty dollars damages.

PARENT AND CHILD. — A father is entitled to the services of his minor children. He has the right to control such services, and to recover their value from any person from whom they may be due: *Ohio R. R. Co. v. The dall*, 13 Ind. 366; 74 Am. Dec. 259; *Gilley v. Gilley*, 79 Me. 292; 1 Am. St. Rep. 307. If he does not emancipate his child, its earnings belong to him; and, like his other property, may be reached by his creditors, under appropriate process for the collection of their demands: *Godfrey v. Hays*, 6 Ala. 501; 41 Am. Dec. 58. But the father may emancipate his child whenever he chooses so to do. This right is not within the control of his creditors, and they cannot prevent an insolvent father from relinquishing all right to the future services or earnings of his child: *Penn v. Whittehead*, 17 Gratt. 503; 94 Am. Dec. 478; *Bobo v. Bryson*, 21 Ark. 387; 76 Am. Dec. 406; *Wilson v. McMillan*, 62 Ga. 16; 35 Am. Rep. 115, and note 117-121. The emancipation may be inferred from circumstances, and whether the circumstances establish an emancipation is a question of fact for the determination of the jury: *Beaver v. Bare*, 104 Pa. St. 58; 49 Am. Rep. 567; *Ream v. Watkins*, 27 Mo. 516; 72 Am. Dec. 283. The emancipation may be complete, though the child continues to reside with its parents: *Rush v. Vought*, 55 Pa. St. 437; 93 Am. Dec. 769; *Beaver v. Bare*, *supra*.

BURT v. TIMMONS.

[29 WEST VIRGINIA, 441.]

FRAUD MAY BE INFERRED FROM FACTS CALCULATED TO ESTABLISH IT; and should be so inferred when the facts and circumstances lead a reasonable man to the conclusion that an attempt has been made to withdraw the property of the debtor from the reach of his creditors, with the intent to prevent them from recovering their just debts.

FRAUD. — TRANSACTIONS BETWEEN HUSBAND AND WIFE, father and child, brother and sister, and other relatives, may be shown to be fraudulent as against creditors by less proof, and the party claiming the benefit of such transactions is held to fuller and stricter proof of their justice and fairness, after they have been shown to be *prima facie* fraudulent, than would be required if the transaction was between strangers.

FRAUD — BURDEN OF PROOF. — WIFE PURCHASING PROPERTY FROM HER HUSBAND must assume the burden of distinctly proving that she paid therefor out of funds not furnished by him, if the transfer is assailed by his creditors.

PRESUMPTION WHEN PROPERTY IS CONVEYED TO WIFE IS THAT THE MEANS OF PAYING THEREFOR were furnished by her husband.

IMPROVEMENTS PUT UPON REAL PROPERTY OF WIFE, IN FRAUD OF CREDITORS OF HUSBAND, can be followed by them on the premises where they are put; and such realty in favor of such creditors can be charged with the value of such improvements.

WHERE HUSBAND'S CREDITORS SUCCESSFULLY ASSAIL AS FRAUDULENT A TRANSFER OF REAL PROPERTY MADE BY HIM TO HIS WIFE, and the amount of their debts is so small that they can be paid out of the rents in a short time, the court may, in its discretion, order the land to be rented out, and the rents turned over to them until their debts are paid;

but if the debts are so large that it will require some years to pay them out of the rents, the property will be ordered sold, the creditors paid out of the proceeds, and the residue turned over to the wife.

BILL to set aside transfer made by B. B. Timmons to his wife, Josephine E. Decree for defendants. Complainant appealed.

Hutchinson and Johnson, for the appellant.

GREEN, J. The question upon which the decision in this case must depend is largely a question of fact. And as the conclusion I have reached is the reverse of that of the circuit court, I have deemed it proper, in the statement of the case, to give the facts and the evidence, which is contradictory, at considerable length. The undisputed facts of the case are, that on September 10, 1878, the plaintiff recovered against the defendant, B. B. Timmons, a judgment for \$173.67, with interest thereon from September 9, 1878, and costs amounting to \$10.15, on which judgment execution was promptly issued and returned, "No property found." Not a cent was paid on this judgment till after the institution of this suit. About two and a half years thereafter, on April 5, 1880, A. C. Imlay conveyed to his sister, Josephine E. Timmons, wife of B. B. Timmons, and one of the defendants in this suit, a small building-lot in the town of St. Mary's, in Pleasants County, West Virginia, containing about one seventh of an acre, to build a house upon. The consideration named in this deed was \$110 cash. Almost immediately after this conveyance was made, a dwelling-house worth about one thousand dollars was put up on the lot, and Timmons and his wife lived in it. This suit was brought not long afterwards to set aside the deed, and to subject the house and lot to the payment of the aforesaid judgment, on the ground that the deed was fraudulent and void because made to hinder, delay, and defraud the creditors of Timmons, the plaintiff asserting and attempting to prove that the lot was purchased with and the house built out of funds furnished by the said Timmons. This was denied by the defendants; and they endeavored to prove that not a cent of B. B. Timmons's money was used either to buy the lot or build the house. The court below so held, and dismissed the plaintiff's bill, and rendered a decree against him for costs. This is the decree appealed from by the plaintiff.

Before considering this question upon the evidence, I will

state a few legal propositions, which will aid us in reaching a correct conclusion as to whether or not the defendants were guilty of a fraud in obtaining the conveyance of this lot to be made to the wife, and in the building of the house upon it.

1. A fraud upon creditors consists in the intention to prevent them from recovering their just debts by an act which withdraws the property of the debtor from their reach: *McKibbin v. Martin*, 64 Pa. St. 352; 3 Am. Rep. 588; *Alabama Ins. Co. v. Pettway*, 24 Ala. 544. It is often said that fraud must be proved, and is never to be presumed. This is true only when understood as affirming that a contract or conduct apparently honest and lawful must be treated as such until it is shown to be otherwise by evidence either positive or circumstantial; but fraud may be inferred from facts calculated to establish it; and fraud should be so inferred when the facts and circumstances are such as to lead a reasonable man to the conclusion that an attempt has been made to withdraw the property of the debtor from the reach of his creditors with the intent to prevent them from recovering their just debts; and if *prima facie* such fraudulent attempt is thus established, it may be regarded as conclusively established, unless it is rebutted by facts and circumstances which are proven: *Martin v. Rexroad*, 15 W. Va. 512; *Knight v. Capito*, 23 Id. 644; *Kaine v. Weigley*, 22 Pa. St. 179.

That this proposition may be clearly understood, I will cite some remarks of Black, C. J., in the case last above cited. On page 183, he says: "It is said fraud must be proven, and is never to be presumed. This proposition can be admitted only in a qualified and limited sense. But is often urged at the bar, and sometimes assented to by judges, as if it were a fundamental maxim of the law, universally true, incapable of modification, and open to no exception; whereas it has scarcely extent enough to give it the dignity of a general rule, and, as far as it does go, it is based on a principle which has no more application to frauds than to any other subject of judicial inquiry. It amounts but to this: that a contract honest and fair on its face must be treated as such until it is shown to be otherwise by evidence of some kind, positive or circumstantial. It is not true that fraud can never be presumed. Presumptions are of two kinds, legal and natural. Allegations of fraud are sometimes supported by one and sometimes by the other, and are seldom, almost never, sustained by that direct and plenary proof which excludes all

presumption. . . . When creditors are about to be cheated, it is very uncommon for the perpetrators to proclaim their purpose, and call in witnesses to see it done. A resort to presumptive evidence, therefore, becomes absolutely necessary to protect the rights of honest men from this as from other invasions. Upon such evidence, the highest criminal punishments are inflicted, and the most important rights of property constantly determined. Fraud in the transfer of goods or lands may be shown by the same amount of proof which would establish any other fact in its own nature as likely to exist. In any case, the number and cogency of the circumstances from which guilt is to be inferred are proportioned to the original improbability of the offense. The frequency of fraud upon creditors, the supposed difficulty of detection, the powerful motives which impel an insolvent man to conceive it, and the plausible casuistry with which it is sometimes reconciled to the consciences even of persons whose previous lives have been without reproach,—these are the considerations which prevent us from classing it among the grossly improbable violations of moral duty; and therefore we often presume it from facts which may seem slight. Besides, when a man who knows himself unable to pay his debts disposes of his property for a just purpose, he can easily make and produce the clearest evidence of its fairness. . . . It is no hardship upon an honest man to require a reasonable explanation of every suspicious circumstance; and rogues are not entitled to a veto upon the means employed for their detection."

These remarks seem to me to be just and clear; and they explain the true meaning and scope of this first legal proposition.

2. Transactions between father and child, brother and sister, husband and wife, or between others between whom there exists a natural and strong motive to provide for a dependent at the expense of honest creditors, if such transaction is impeached as fraudulent, may be shown to be fraudulent by less proof, and the party claiming the benefit of such a transaction is held to a fuller and stricter proof of its justice and fairness, after it has been shown to be *prima facie* fraudulent, than would be required if the transaction was between strangers: *Knight v. Capito*, 23 W. Va. 644, 645; *Bump on Fraudulent Conveyances*, 8d ed., 57-59, and authorities cited. This proposition seems to be a necessary conclusion from the opinion of Judge Black in *Kaine v. Weigley*, above quoted. For,

as stated by him, "when a fraud is sought to be established in any case, the number and cogency of the circumstances from which guilt is to be inferred are proportioned to the original improbability of the offense"; and, of course, when the transaction is between near relatives or connections, as father and child, or husband and wife, there is a strong motive naturally to provide at the expense of honest creditors, where the protector is embarrassed or insolvent, and, of course, the improbability of a fraud on creditors for this purpose is diminished, and the evidence necessary to establish it is correspondingly diminished.

3. When a wife purchases land or other property, the burden is upon her to prove distinctly that she paid therefor with funds not furnished by her husband. Evidence that she purchased amounts to nothing, unless it is accompanied with clear and full proof that she paid for it with funds furnished by some one other than her husband. In the absence of such proof, the presumption is, that her husband furnished the means of payment: *Stockdale v. Harris*, 23 W. Va. 499; *McMasters v. Edgar*, 22 Id. 678; *Ross v. Brown*, 11 Id. 122; *Core v. Cunningham*, 27 Id. 206; *Herzog v. Weiler*, 24 Id. 203.

4. Improvements put upon real property of the wife in fraud of creditors of the husband can be followed by them on to the premises where they are put; and the realty can, in favor of such creditors, be charged to the extent of the value of such improvements: *Ross v. Brown*, 11 W. Va. 137; *Core v. Cunningham*, 27 Id. 206.

5. A transfer of property, either directly or indirectly, by an insolvent husband to his wife is justly regarded with suspicion; and unless it clearly appear to have been entirely free from wrong intent to withdraw the property from the husband's creditors, or the presumption of fraud be overcome by satisfactory affirmative proof, it will not be sustained.

Let us now consider the evidence in connection with these well-settled principles of law, and determine whether the house and lot should have been subjected to the payment of the balance due on the plaintiff's judgment against B. B. Timmons. When this lot was conveyed to his wife, and while the house was being built, he was carrying on a grocery business in an adjoining county, in partnership with another person. He owned individually no visible property. All that he was worth was his interest in the said partnership and such debts as might be due, he having been carrying on the business for

a short time prior to the formation of the partnership. This partner owed Timmons \$521.15, for which Timmons held his note, given, probably, at the time the partnership was formed. What other debts were due him does not appear, — probably very few. He was evidently a man of small means, the execution on the plaintiff's judgment having been returned, "No property found." His wife lived at her father's, in St. Mary's, and he visited her every two or three months. Her father's family consisted of two sons, herself, and perhaps an adult unmarried daughter, who had been or perhaps was then teaching school. This family was poor, having no visible property except the house in which they lived, and were supported by the daily labor of the father and the two sons, they being all rough carpenters. Timmons's wife had no separate estate, and her husband being a poor man, she lived with her father. In 1879 it was concluded to break up this arrangement, and that her husband should purchase a small lot in the same village, and build a house on it; and as he was in debt, it was concluded that the deed for the lot should be made to his wife. Accordingly a part of the material for the house was purchased in 1879 of Jones and Haines. This lumber cost \$104; and her brother, A. C. Imlay, who was married and lived in the same village, acted as agent in making the purchase of this lumber, the money, he says, having been given to him by Timmons's wife afterwards, or perhaps it might have been given to him as such agent before; but it is entirely clear, from our third legal proposition above stated, that the money with which this lumber was bought must be regarded as furnished by her husband, neither her father, nor either of her brothers, nor any other person, pretending to have given it to her. Some time afterwards, in April, 1880, her married brother conveyed this lot to her for \$110 in cash, as the deed states and as he testifies. This \$110, another brother testifies, was given to her by himself out of money which he had earned; and her husband testifies that he knew nothing of this till afterwards, when he visited his wife. These statements are, it seems to me, clearly untrue. A. C. Imlay testifies "that he supposed it was her money; but he did not ask her, and he did not know where she got the money." And he says the same about the money she gave him (\$104) to buy lumber with, or to repay him for lumber which he had bought. Can it be believed that thus receiving from his sister in a short time more than two hundred dollars, when he knew she had no separate estate, and was doing

nothing, but was living with her father, who was a poor man, and, as he says himself, had nothing to give her, he made no inquiry as to where she got the money, unless he knew that she received it from her husband, who was engaged in business as a partner of Shoefeldt? Can it be believed that her brothers, who also lived in their father's house, and helped support the family by day's labor, gave her this \$110? He testifies that he gave it to her to buy this lot with, out of his earnings as a day-laborer; but he does not tell us why he gave it to her, — whether he owed it to her or not. All he says is: "He did not know that her husband had any right or interest in this money which he paid to his wife." It seems to me incredible that a man who probably, as a day-laborer, never had \$110 at one time, should give, as I suppose he means to be understood, to his married sister this amount of money at one time to buy a lot upon which to build a house when her husband was engaged in business, and was far more able to buy a lot and build a house than he was. The truth, I presume, is, that the husband, B. B. Timmons, sent him the money for his wife, and he handed it over to her to buy this lot, if it be true that she paid for it.

The third legal proposition laid down above requires that the presumption in such a case is, that the money was furnished by her husband; and the presumption can be rebutted only by clear and full proof that she paid for it with funds furnished by some one other than her husband. I do not deem the testimony of her brother that he furnished her the money as "clear and full proof." On the contrary, it seems to me very unsatisfactory proof, especially when it appears that she is not called as a witness to prove this fact, and that it clearly contradicts her own statement in her answer, "that this lot was paid for by herself out of some money she then had, but the greater part of said sum was paid by her father and brother for her." The depositions of her father and of the brother referred to were taken, and they contradict this statement in her answer. It would seem that, after the answer was filed, the story about this \$110 was changed, and the pretense was set up by her brother, A. C. Imlay, that she paid in cash the whole of this \$110 at one time, the money having been given to her by another brother for that purpose. The statements in reference to this money made in the answer, and those made in the depositions taken by the defense, are all obviously false; and these being false, the legal presumption,

in the absence of clear and full proof to the contrary, that her husband furnished her this money must be regarded as the real truth.

Of course the statement in her husband's deposition that he never heard of this transaction, and did not know about this intended purchase till he came home afterwards, is utterly false. Lumber to build a house on this lot had been bought with money furnished by him months before this deed was made to his wife. There is not even a pretense that the \$104 with which that lumber was bought was furnished by any one else. Her father and brother in their depositions do not pretend that they, or any one of them, ever gave her any money except the \$110, with which it is pretended she bought the lot. They do say that they gave her their labor in the building of the house; and that is doubtless true. But it is clearly proven that her husband paid for a part of the labor on the house; and as she had no money or income, and her father and brothers gave her no money, of course her husband furnished her with all the money which she in person or through her father or brothers paid to other workmen for labor on the house.

While her father and brothers in their depositions state that they gave her a small part of the materials used in building the house, it is clearly proven that the great mass of the materials was bought with money furnished by her husband. Besides the \$104 worth of lumber bought of Jones and Haines before the building was commenced, her husband bought of the Parkersburg Mill Company lumber and other materials for the house, to the amount of \$262.25, and of Jenkins all of the lime, plaster, glass, and sash used in building the house. What they cost does not appear, but after paying for most of the articles, he still owed thirty-four dollars, for which he gave his note. His purchases of materials alone are thus proven to have exceeded four hundred dollars, while the money paid by him or out of his funds to laborers on the house is clearly shown to have exceeded one hundred dollars. There was therefore certainly more than five hundred dollars of B. B. Timmons's money invested in the house alone. It is true that in his deposition he testifies that his wife afterwards repaid him for this outlay, and that none of his estate was really used in the construction of the house; but he says he could not tell where she got the money to repay him, but supposes her brothers could tell. Their depositions were taken; but they did not know where this money came from; and she, who would

certainly have known, fails to testify at all. This statement of her husband is obviously a base falsehood. She never repaid to him one cent of the money he had invested in the building of this house, for she never had a cent of her own with which to repay him. By our fourth legal proposition, certainly the plaintiff in this cause had a perfect right to charge this house and lot with the payment of his judgment against B. B. Timmons to the extent of at least five hundred dollars, the amount which he certainly invested in the house. I do not doubt that he invested more than seven hundred dollars; but as the plaintiff's judgment now unpaid is much less than five hundred dollars, it is unnecessary to ascertain more accurately the amount which he really invested in the house and lot, as the amount already ascertained is amply sufficient to pay off the balance of the plaintiff's judgment, with interest and costs.

The next inquiry is: What was the true balance due on the plaintiff's judgment when the court below rendered its decree dismissing the plaintiff's bill on June 16, 1886? Timmons in his deposition states that he had paid on this judgment \$109.70, for which he took the receipts of the plaintiff's attorney, which he filed with his deposition. There were five such receipts, by which the payments appear to have been made between December 8, 1881, and January 13, 1882. It is true, these receipts in some cases do not clearly identify the debt on which the payment was made. One of them, for instance, states that the payment was made on a judgment of *W. Burt v. B. B. Timmons* in the county court of Pleasants County; and another states that the payment was made on a judgment of *Burt, Sons, & Co. v. B. B. Timmons*; but as they are all signed by the attorney who filed the bill for the plaintiff in this cause, and as it is not shown that William Burt had any other judgment against B. B. Timmons, I am of opinion that all those receipts should be allowed as credits on this judgment as of their respective dates. Timmons in his deposition states that he paid, in addition to the sums named in the said receipts, twelve dollars on this judgment, for which he never took a receipt. He gives no reason for not taking such receipt; and as one of the receipts produced is for twelve dollars, I infer that this is the payment for which he says he took no receipt; and this inference is, I think, made almost conclusive by his statement in his answer sworn to by him in June, 1883, that he paid the plaintiff's attorney for W. Burt, at various

times, the sum of \$113.50, for which he took receipts. There being, then, in less than a year after the last payment was made, no claim of any payment for which he took no receipt, when it is considered that he has shown himself capable of testifying to gross falsehoods when tempted by his interests, it is plain that no credit should be given him on this judgment except these five receipts. Allowing these credits as of the respective dates on the receipts, and calculating the interest on the judgment as stated on its face, the balance due on it on June 16, 1886, when the decree dismissing the plaintiff's bill was rendered, was \$168.48, the payments being little more than enough to meet the costs recovered in the common-law suit and accrued interest on the judgment.

Instead, therefore, of dismissing the bill, the circuit court should in its decree have established this as the amount due on the plaintiff's debt, and should have declared it a charge upon the house and lot, and should have provided for its payment out of the same. I have much difficulty in understanding how any other conclusion could have been reached.

Judge Snyder, in *Core v. Cunningham*, 27 W. Va. 206, says: "From the repeated decisions of this court, it seems to me that suitors and counsel should have long since become aware of the fact that it requires a great deal more than the raising of a simple doubt or probability to establish the right of a wife to property which she seeks to withhold from the creditors of an insolvent husband: *Lockhard v. Beckley*, 10 W. Va. 87; *Hunter v. Hunter*, 10 Id. 321; *Rose v. Brown*, 11 Id. 122; *McMasters v. Edgar*, 22 Id. 673; *Stockale v. Harris*, 23 Id. 499; *Herzog v. Weiler*, 24 Id. 199; *Maxwell v. Handshaw*, 24 Id. 405; *Bank v. Wilson*, 25 Id. 242."

In the case before us, this "simple doubt or probability" has not been raised. In endeavoring to ascertain what there was in this case to raise such a doubt, I have thought it possible it was raised by certain portions of the evidence which seemed to me so entirely valueless that in stating the case I omitted it entirely; but as counsel for the defendant propounded questions to three witnesses in order to prove this omitted matter, I presume he must have attached some importance to it, and for that reason I will now state it. To two of the workmen on the house, other than members of Mrs. Timmons's family, the question was put: "Was it not generally understood in the community that her father and his sons paid for and built the property in controversy?" And they

answered that they knew nothing about that. But a third workman, who seems to have been engaged only in hauling materials for building,—“draying,” as he called it,—in answer to the question, “Have you not always known and been informed of the fact that her father and brothers built that house for her?” replied: “That was the understanding I had,—that they were building it for her”; and to the question asked of the other two workmen, he answered: “I was not attending to that part”; and he afterwards said he did not know who furnished the money to build the house. All that this evidence tends to prove is, that Mrs. Timmons’s father and brothers imposed upon one at least of the workmen engaged on the building the impression that they, at their own expense, were building the house for her; and that with all their efforts they failed to impose this impression on the other workmen. I cannot believe that this sort of evidence had any weight with the court below, though it was evidently to some extent relied on by the counsel for the defendant.

I suppose that the real trouble in reaching correct decisions in these cases is, that the rules of law which have been laid down have been misapprehended, though this court has endeavored to make them clear. Yet some seem still to think and act as though to establish a fraud in cases like the one before us required evidence almost as strong as the evidence required to convict in a criminal prosecution; and when fraud is established by direct proof or by necessary inference, they seem to think that the slightest evidence ought to be regarded as sufficient to explain and rebut the facts which establish the fraud. It is hoped that these erroneous views will be abandoned; for if they prevail, our married woman’s act, and acts permitting interested witnesses and parties to testify, and husbands and wives to testify for each other, will be utterly perverted from the purpose for which these acts were passed; and they will become the fruitful source of fraud and perjury. These acts were not designed, and the courts should not permit dishonest debtors to use them, to defraud their honest creditors, and to retain their property for their own use by withdrawing it from their creditors by fraudulent investments of it in the names of their wives. This practice is becoming too common, and should be strongly discountenanced by the courts. It cannot be effectually checked so long as the false views of the evidence necessary to establish fraud in such cases, and to rebut it when *prima facie* established, are abandoned.

It remains only in this case for us to determine in what manner this house and lot shall be subjected to the payment of the plaintiff's debt, whether by renting out the property or by its sale. It has been contended that if the rents of the property will pay the debt in five years, or in a reasonable time, the property should not be sold. This suit was not brought simply to enforce the plaintiff's judgment lien against real estate. Its real object was to set aside the conveyance of this lot to the debtor's wife as fraudulent against the plaintiff, a creditor of the husband, and to subject the house and lot in the hands of the fraudulent grantee, the wife, to the payment of this debt of her husband. This could be done, though the plaintiff had not recovered a judgment on his debt. The deed, though fraudulent as to the creditors of the husband, is nevertheless binding on the grantor and on the husband of the grantee: *Murdoch v. Wells*, 9 W. Va. 552; *Duncan v. Custard*, 24 Id. 730. Mrs. Josephine E. Timmons holds this house and lot as her own, subject to the debts of her husband, against whose creditors this deed may be declared fraudulent. This house and lot, if sold, will be sold as hers, and not as the property of her husband. It is therefore not proper, in such a case, either to convene the husband's creditors or to rent out the property. The wife, in this case, therefore, has no right to require the house and lot to be rented out to pay the plaintiff's debt charged upon it, though it should appear that said debt could thus be paid in less than five years, or in a reasonable time. If it was apparent that the only debt chargeable on the house and lot could be paid in a short time by renting the house, it might be within the discretion of the court to do so: *Core v. Cunningham*, 27 Id. 210. In the case before us, it would probably take four years' rent of the house to pay the plaintiff's debt, with the costs. He has already been delayed seven years by the fraudulent conduct of the defendants; and it would be unreasonable to subject him to further and unnecessary delay in order that the defendants might possibly derive some benefit. This house and lot should therefore be sold to pay the plaintiff's debt, and the costs in this court and in the court below.

My conclusion, therefore, is, that the decree of the circuit court of Pleasants County, rendered on the sixteenth day of June, 1886, should be set aside, reversed, and annulled, and the appellant must recover of the appellee his costs in this court expended; and this cause must be remanded to the cir-

cuit court of Pleasants County, by a proper decree to be therein entered, to subject this house and lot to the plaintiff's claim of \$168.48, with interest thereon from the sixteenth day of June, 1886, till paid, and the costs of the plaintiff in this cause both in the circuit court and in this court, and with instructions to enter a proper decree for the sale of said house and lot, if the said charge thereupon is not paid in a reasonable time to be fixed by the court below, and to proceed further in the cause according to the principles governing courts of equity.

FRAUD, PRESUMPTIONS REGARDING, and sufficiency of evidence to establish: See note to *Burch v. Smith*, 65 Am. Dec. 157-164.

CONVEYANCES FROM HUSBAND TO WIFE: *Wilder v. Brooks*, 10 Minn. 50; 88 Am. Dec. 54; *Thompson v. Allen*, 103 Pa. St. 44; 49 Am. Rep. 116; *Warlick v. White*, 86 N. C. 159; 41 Am. Rep. 453; *Pech v. Brammington*, 31 Cal. 440; 89 Am. Dec. 195.

CONVEYANCES FROM HUSBAND TO WIFE, or from one relative to another, are viewed with suspicion when they interfere with the rights of the grantor's creditors. The proof requisite to support them should be clear and convincing, because the temptation for a distressed debtor to shelter his property from the pursuit of his creditors by placing it in the name of one of his near relatives is very great: *Little v. Birchwell*, 21 Tex. 597; 73 Am. Dec. 242.

STATE EX REL. NEIDER v. REUFF.

[29 WEST VIRGINIA, 751.]

FATHER'S RIGHT TO CONTROL THE CUSTODY OF HIS CHILDREN CEASES WITH HIS LIFE. He cannot make any contract regarding their custody or services which will control them after his death, unless by indentures of apprenticeship in conformity with the provisions of some statute.

ON DEATH OF THE FATHER OF MINOR CHILDREN, THEIR MOTHER BECOMES ENTITLED TO THEIR CUSTODY, notwithstanding the father in his lifetime placed them in custody of some other person, and agreed that they should remain in such custody during their minority.

RIGHT OF MOTHER TO CUSTODY OF HER CHILDREN IS NOT TERMINATED BY HER SECOND MARRIAGE.

AGREEMENT BY FATHER WITH AN ORPHANS' HOME OR ASYLUM, whereby he surrenders to it his minor child, and relinquishes all power and control over such child, and the Home covenants to receive and provide for the child in accordance with the provisions of the statute of the state, becomes inoperative on the death of the father. One receiving the child from the Home cannot acquire any greater or more enduring right to the custody of the child than the Home itself had.

MOTHER WILL BE AWARDED THE CUSTODY OF HER CHILD, ON HABEAS CORPUS, notwithstanding the return shows that the child is in the care of another person, who, having no children, regards it with the same

affection as he would a child of his own, and is able to rear it more indulgently, educate it more highly, and provide for its future more abundantly than its mother.

HABEAS CORPUS.—THE COURT is not precluded by the return on *Abeas corpus*, in West Virginia, from inquiring into the truth of all matters therein alleged.

RETURN TO WRIT OF HABEAS CORPUS SHOULD SO STATE the facts necessary to warrant the detention as to apprise the opposite party of what is intended to be proved, and these facts ought not to appear by way of recitals only.

LEAVE SHOULD BE GRANTED TO AMEND A RETURN TO A WRIT OF HABEAS CORPUS, where it appears that further inquiry ought to be made respecting an important fact not distinctly alleged in the return, which fact, if ascertained to exist, would show that petitioner is not a proper person to have the control of the child, whose custody he seeks to obtain.

HABEAS CORPUS, by which Mary Neider seeks to obtain the custody of her minor child. Judgment in favor of respondent.

W. P. Hubbard and D. O'Keef, for the plaintiff in error.

WOODS, J. On the eighth day of February, 1886, Mary Neider presented her petition to one of the judges of the circuit court of Ohio County, alleging that she is the mother of Agnes Neider, aged less than three years, whose father, her husband, died on the — day of —, 1885; that said child is unlawfully detained in said county from her care, control, and custody, and that she is deprived of her lawful right by one George Reuff; and prayed that the writ of *habeas corpus ad subjiciendum* might be granted her to free her child from unlawful custody, commanding him to produce the body of the child, and that she might be awarded the custody thereof.

By the order of the judge, made in vacation, on the eighth day of February, 1886, the writ was issued, returnable to the tenth day of February, 1886, and was executed the next day. On the fifth day of January, 1887, Reuff produced the child in court, and made return to the writ in substance: That he has and is entitled to have the lawful care and custody of the child, Agnes Neider, because, he says, that on the fifteenth day of October, 1884, Mary Neider (the relator), the mother of the child, being insane, and an inmate of the hospital for the insane at Weston, in this state, having been duly and legally adjudged insane, and duly committed to said hospital according to law, Nicholas Neider, the father of said child, having the lawful custody thereof, placed her in the custody of the Children's Home of the City of Wheeling, a corporation created and existing in the city of Wheeling under chapter 55 of the code of West Virginia. and by an instru-

ment in writing executed by him, relinquished forever all power and control over her, and invested said Children's Home with the same power and control over her as he himself theretofore possessed; and that afterwards, on the twenty-first day of October, 1884, the Children's Home indentured her to him until she should become eighteen years of age, and gave him by virtue thereof the custody and care of the child; and that he has ever since provided for her in a comfortable manner, and treated her with kindness and affection, and she is in healthy, happy, and comfortable condition; and that, as he and his wife have no children, he regards this child with the same attachment and affection as he would a child of his own; and that since she has been in his care he is attending to her education in a manner essential to her tender years.

The instruments in writing made between the father and the Home, whereby he relinquished to it the custody of the child, and whereby the Home pretended to bind her to the respondent, as well as the charter of the Home issued by the recorder of Ohio County, are made parts of said return.

It is unnecessary to say anything further in reference to the contents of these instruments, except that by the charter of the Children's Home the purpose of its creation is declared to be "for the purpose of affording a home, food, clothing, and schooling for destitute or friendless children, and to place them with respectable families or persons to learn some useful trade or occupation."

The relator moved to quash, and also demurred to the return, which motions the court overruled.

On the 11th of January, 1887, the cause was finally heard, when the circuit court entered the following judgment:—

"This day came again the parties by their attorneys, and the petitioner moved the court for an order and judgment that the petitioner have the custody of the person of said infant, Agnes Neider, and that she be delivered by the respondent, George Reuff, to the petitioner, Mary Neider, which motion was argued by counsel and overruled by the court, to which ruling the petitioner by counsel excepts; and thereupon the court, having heard this matter upon the petition and the return alone, doth consider that the respondent, George Reuff, do retain the custody and possession of the said Agnes Neider, and that respondent recover of the petitioner his costs by him about his defense in this behalf expended."

To this judgment the petitioner has obtained a writ of error.

The grounds of error assigned are: 1. The action of the court in overruling the motion to quash the return, and in overruling the demurrer thereto; 2. In overruling the relator's motion to have the custody of the person of her infant child.

This case presents for consideration, among others, the following questions: What is the extent and duration of the father's right over the custody of the person and the care of the education of his minor child? In what manner and during what period may he dispose of the custody of such child during his lifetime? Under what circumstances does the right of the father to the custody of such child cease, and the mother succeed to this right to the custody of such child? By whom and in what manner may such child be bound out as an apprentice? and what rights were acquired by the Children's Home to the custody of the child, Agnes Neider, by the agreement made with its father when he relinquished to the Home his control over the child? and what right was acquired from the Home by the respondent to the custody of the child?

From the view we have taken of this case, it is unnecessary for us to consider whether the act of the legislature passed on the 3d of March, 1870, referred to in the agreement dated the 15th of October, 1884, entitled "An act to provide for orphans and destitute children," is constitutional or not, and therefore on this subject we express no opinion.

A careful examination of the authorities leads us to the conclusion that by the common law the father is entitled to the custody of his minor children and to the benefit of their labor while they live with and are maintained by him. This right grows out of his obligation to maintain and educate them, and is correlative to it; but this obligation continues only during the lifetime of the father.

While the common law imposes no obligation on the father to provide for the support of his infant children after his death, it does not confer upon him the right correlative to it, to bind them to service after his death: *Johnson v. Terry*, 34 Conn. 259; *State ex rel. Mayne v. Baldwin*, 5 N. J. Eq. 454; 45 Am. Dec. 399; *Campbell v. Cooper*, 34 N. H. 49; *Jenness v. Emerson*, 15 Id. 486; 1 Bla. Com. 452, 453.

An agreement by the father for the services of his minor child ceases to be binding on the minor at the death of his father, unless made by indentures of apprenticeship in conformity with the provisions of some statute authorizing him to do so, and therefore a parol gift of the child by the father

gives no right to the services of the child after the father's death.

The father is entitled to the custody of his minor children as guardian by nature and guardian by nurture, and this guardianship is a personal trust in the father, and he has no general power to transfer or give them to another, nor can he alienate his right to the custody and control of his minor child, except that he may bind it out as an apprentice: *State ex rel. Mayne v. Baldwin*, 5 N. J. Eq. 454; 45 Am. Dec. 399; *People v. Mercein*, 3 Hill, 399; 38 Am. Dec. 644; *Queen v. Smith*, 16 Eng. L. & Eq. 221; *Day v. Everett*, 7 Mass. 145; *Moore v. Christian*, 58 Miss. 406; 31 Am. Rep. 375; *Jenness v. Emerson*, 15 N. H. 486.

In *Queen v. Smith*, *supra*, it was decided that where the father had agreed with the uncle of his infant child to permit it to live with the uncle, to be brought up and educated until it was grown up, and the uncle had agreed to bring up and educate the child as his daughter, and in pursuance of this agreement the child was committed to the uncle, the father, notwithstanding the agreement, might revoke his consent; and the court, upon a writ of *habeas corpus* obtained by the father, was bound to order the child to be restored to the father's custody.

In *Day v. Everett*, *supra*, it was held that the father may contract that his minor son shall labor in the service of another for any period of time, provided the term do not exceed the period of the child's emancipation, which may take place as well on the father's death as on the son's arriving at the age of twenty-one years.

Where the father is dead, the mother becomes entitled to the custody of the minor children as guardian by nature and guardian by nurture, notwithstanding the father in his lifetime had placed them in the custody of any other person to whom they had not been lawfully bound as apprentices.

In *Moore v. Christian*, *supra*, a father gave his son, ten years of age, to a man of good character and ample means, to keep him during his minority. The father dying three years afterwards, the mother sued out a *habeas corpus* for the child. The court held that she was entitled to the custody of the child, although she was poor and dependent, and the child preferred remaining with the respondent.

In this case it appeared that the respondent was a man of good character and some property. The mother was very

poor and illiterate, dependent upon her daily labor in the fields for the support of herself and five children, all of whom, save one, was younger than this son.

Chalmers, J., delivering the opinion of the court, said: "It is indeed held that this right to the custody of children, given by nature and by God to parents, must give way to the permanent interest of the child, if it be shown that the life, health, or morals of the child will be prejudiced, or his usefulness as a citizen seriously jeopardized by remaining under the parental control; but it is not meant by this that the courts can sit in judgment whether a wealthy stranger can give to the child more worldly advantages than an indigent parent. This would be to make poverty a crime, and to punish it with the bitterest penalties."

In *Pierce v. Massenburg*, 4 Leigh, 493, 26 Am. Dec. 333, it was held that a father cannot bind his infant child apprentice by indenture to which the child is not a party, and that indentures of apprenticeship executed by the father without the child's concurrence are not only voidable, but absolutely void: *King v. Armsby*, 3 Barn. & Ald. 584; *King v. Crawford*, 8 East, 25; *King v. Ripon*, 9 Id. 295.

By the doctrines of the common law, a father cannot bind his infant son apprentice without the assent of the son, and such assent proved by his signature to the indenture; but that in this manner he may bind him.

In *Armstrong v. Stone*, 9 Gratt. 102, it was held that after the father being dead, the mother is entitled to the custody of their child as of right, and that she does not lose this right by a second marriage. But where she is seeking by the writ of *habeas corpus* to have the child placed in her custody, the court may exercise its discretion, and determine whether, under all the circumstances, it is best for the infant that he should be assigned to the custody of his mother.

In this case, the father at his death left no estate, and the mother during her widowhood supported herself by her own labor, but the child was left with its paternal grandparents, who were proved to be persons of exemplary character, warmly attached to the child, whom they had treated with great tenderness and affection.

The mother and her second husband were persons of excellent moral character, and, although married two years, had no children, and the husband was an industrious young man, whose father was in good circumstances. The child was in its

seventh year, too young to judge for itself, and having no legal guardian, there were no circumstances to induce the court in the exercise of a sound discretion to deprive the mother of the custody of her child.

In *Villareal v. Melish*, 2 Swanst. 533, Mrs. Villareal by her having agreed with her father that he should have the care of the persons and estates of her two infant children, and in the event of their death during minority should receive a moiety of their property, afterwards married again; the court upon the petition of the children, ordered that they be delivered to their mother, as guardianship not being assignable at law or in equity, the right of the mother to be the guardian of her children continued notwithstanding her second marriage. Lord Eldon said: "Her deed did not transfer the guardianship, and that her father under said deed gained no right to the guardianship of the children."

So where the wife of the petitioner on her death-bed, with his consent, gave their infant child, then only five months old, to her mother for nurture, maintenance, and education until she should reach the age of twenty-one years, and the grandmother accepted the trust, took the child, and raised it with the most tender care until it was seven years old, the child, upon a *habeas corpus* sued out by the father, was ordered to be delivered into his custody.

Haymond, president, delivering the opinion of this court, said: "I do not think that the evidence in this case shows that the petitioner has waived or abandoned his paternal right by permitting his child to remain so long with its grandmother, or that he ever transferred or intended to pass his paternal rights to his child to the grandmother so as to deprive him of his legal right to require it": *Rust v. Vanvacter*, 9 W. Va. 600.

By the common law, the natural right of the father to the custody of his infant child arose out of his duty to maintain and support it, and continued only so long as he was obliged to do so, and as this duty ceased with his life, so did his right to control or direct the custody of the child, except where he had by indentures lawfully bound the child to another as an apprentice.

This right, however, was extended, under certain circumstances, after his death, during the minority of the child, or for any less period, by the statute of 12 Car. II., c. 24, which authorized the father, although himself an infant, by deed or

will, to appoint guardians for such of his children, born or unborn, who were infants and unmarried at the time of his death, until they should respectively attain the age of twenty-one years, or for any less time, who were entitled to have the custody of the children as well as of their estates: 1 Bla. Com. 562; 2 Id. 88, and note 10. This provision of the English statute was, with slight alterations, inserted in the revised code of Virginia: Rev. Code 1819, c. 108, sec. 1. The same provision was, in substance, inserted in section 1 of chapter 127 of the code of 1849, but subject to the important qualification contained in the seventh section of that chapter, which declared that "every guardian who shall be appointed as aforesaid (that is to say, in any of the modes prescribed in the six preceding sections of that chapter) shall have the custody of his ward, and the possession, care, and management of his estate, real and personal, and out of the proceeds of such estate shall provide for his maintenance and education; but the father of the minor, if living, and in case of his death, the mother, while she remains unmarried, shall, if fit for the trust, be entitled to the custody of the person of the minor and the care of his education."

These provisions of the code of Virginia were, in substance, adopted by this state in the first seven sections of chapter 82 of the code of West Virginia; but by the seventh section of that chapter, as amended by section 7 of chapter 53 of the acts of 1883, the cruel implication that the mother by a second marriage has rendered herself unworthy to have custody of the person of her own infant child has been removed, for that section, as amended, declares "that the father of the minor, if living, and in case of his death, the mother, if fit for the trust, shall be entitled to the custody of the minor, and to the care of his education."

Such was the legal *status* of the petitioner in this case when she sued out the writ of *habeas corpus* to regain the custody of her child.

Respondent rests his right to retain the child upon the ground that she had been lawfully bound to him until she shall become twenty-one years of age, by the Children's Home, by the indentures set out in his return to the writ. Respondent could not acquire from the Home any greater right to the custody of the child than was acquired by it from the child's father by his agreement of the 15th of October, 1884.

If we admit, for the sake of the argument, that the Chil-

dren's Home of the City of Wheeling is an "orphan asylum" (which we do not mean to decide), and that, as such, it was authorized by said act of the legislature, passed March 3, 1870, to take under its care and guardianship this infant child so voluntarily surrendered to it by its father, as stated in said return, yet, by the very terms of the statute, as well as terms of the instrument surrendering the child, the Home could only acquire and be invested with the same power over the child as the father himself possessed.

We have already shown that his power over the child ceased at his death, unless in his lifetime he had lawfully bound it as an apprentice to another.

In this state, a "minor can be bound as an apprentice" by his father, or if none, by his guardian, or if neither father nor guardian, by his mother, with the consent entered of record of the county court of the county in which the minor resides, or without such consent, if the minor, being fourteen years of age, agree in writing to be so bound; or if such minor be found begging in such county, or is likely to become chargeable thereto,"—and in no other way: Code W. Va., c. 81, sec. 1.

It is not pretended that Nicholas Neider, with the consent of the county court of Ohio County entered of record, bound the infant child, Agnes Neider, to the Children's Home as an apprentice; nor that it was so bound by said county court as one found begging in said county, and likely to become chargeable thereto.

By the article of agreement made between the father and the Home, he surrendered to it his infant child, aged eleven months and sixteen days, and relinquished forever all power and control over it, and invested the Home with as full power and control over the child as he had theretofore possessed; and the Home, in consideration thereof, covenanted to receive the child, and provide for her maintenance, protection, and education, in accordance with the provisions of the act of the legislature passed March 3, 1870.

If we admit, for the sake of the argument, that the Home had the legal capacity to take an apprentice (on which we express no opinion), yet it is very clear that the agreement made by the father with the Home as an indenture of apprenticeship is absolutely void, because entered into without the consent, entered of record, of the county court of Ohio County.

For the same reason, the indenture between the Home and

respondent, whereby he claims the infant was bound to him until she becomes eighteen years of age, is also void, and therefore conferred no right upon him to retain the child against the clear legal right of the mother to have the custody of the child and the care of her education after the father's death.

This right of the father or mother to the custody of their infant child is not an absolute right, to be accorded to either of them under all circumstances. While the statute declares the right to be in the father, if living, and if he be dead, in the mother, yet in both cases it is limited and qualified by the words "if fit for the trust." Recognizing this natural right of the parents, the statute is not unmindful of the rights and welfare of the child.

It has the natural right to the care and nurture of its parents, and also the protection of the court against such misfortunes of its parents, or the influences of such gross and immoral practices in their lives as will seriously imperil the life, health, morals, or personal safety of the child. What measure of wickedness or profligacy on the part of the parent would be sufficient to warrant the court in depriving him of his natural right to the custody of his minor we are not called upon to determine.

It is very certain that in such a case the specific facts relied on to warrant the court in depriving the parent of this natural right would have to be distinctly alleged and clearly proved.

The fact stated in the return, that "the respondent having no children of his own, he regards the child, Agnes Neider, with the same attachment and affection as he would a child of his own," or even additional facts,—such as, that he is able to rear it more indulgently, educate it more highly, and provide for its future more abundantly than its mother,—are unworthy of consideration when weighed against the clear legal and natural right of a mother, however poor and friendless, to the custody of the person of her infant child.

In the case in judgment, nothing is alleged in the return to the detriment of the petitioner's past life, present condition, or future prospects to warrant the court, for the sake of some imaginary benefit to the child, to withhold from her her natural and legal right to the custody of its person and the care of its education.

It is true that the return shows, by way of recital, that at the time her child was given by its father to the Children's

Home she was so unfortunate as to be insane, and an inmate of the hospital for the insane at Weston; but it is not alleged, even indirectly, that she is not now perfectly restored to mental and physical health, or that there is the slightest reason to apprehend that her malady will ever return.

This is a fact so material to the correct determination of this controversy, and so deeply involving the happiness and it may be the life of the child, and withal so easy to be established, that it should not be permitted to remain in doubt.

If, however, the petitioner has been perfectly restored to health, and the court, because of her former affliction alone, should deny her the comfort of the society of her child, then, indeed, would its judgment declare her misfortune a crime, and inflict upon her a punishment as bitter as death.

We are therefore of opinion that the authority of the father to dispose of the custody of his infant child in any other manner than by lawfully binding him as an apprentice, or appointing for him a testamentary guardian, ceases at the time of his death; that he cannot, by any agreement in writing or otherwise, relinquish the custody of the person of his infant child for any longer period than his own lifetime, so as to deprive the mother of the child of the custody of its person and the care of its education after his death; that the agreement entered into between Nicholas Neider and the Children's Home, relinquishing to it the custody of the child, did not deprive the petitioner of her right to the custody after its father's death; that the article of agreement between the Home and respondent, whereby it pretended to bind said child to him, is void, and conferred upon him no right to detain the custody of the child from the petitioner after the death of the father, and unless she be shown to be unfit for the trust, the petitioner is entitled to the custody of the child.

The motion of the petitioner that the infant, Agnes Neider, be delivered to her was in effect a motion to discharge the prisoner from custody. This was a proper mode to test the sufficiency of the return in law, and was in effect a demurrer thereto, for on such motion the return is conceded to be true: *Hurd on Habeas Corpus*, 200.

In this state, the court is not precluded by the return from inquiring into the truth of the matters therein alleged; for by section 6 of chapter 111 of the Code of West Virginia, the court or judge is required to hear the "matter both upon the return and any other evidence," and discharge or remand

the person into custody, or admit him to bail, as may be proper: *Rust v. Vanvacter*, 9 W. Va. 600.

While less certainty is required in returns to writs of *habeas corpus* than in pleadings in civil actions, yet "certainty to a certain intent in general" is required in the return, and the facts necessary to warrant the detention of the party must in substance be alleged, so as to apprise the opposite party of what is intended to be proved, in order to give him an opportunity to answer or traverse it, and these facts ought not to appear by way of recitals only: 2 Doug. 150; Hurd on Habeas Corpus, 255, 257.

The case in judgment was heard and disposed of on the petitioner's motion to discharge the child from custody on the petition and return alone.

The statement in the petition which is the foundation of the petitioner's right to the custody of the child, "that its father is dead," not having been traversed by the return, must be taken as true, and is an admission of her *prima facie* right to the custody of the child. The burden was upon the respondent to aver, and if denied to establish, the facts to warrant the detention of the child. We have already seen that his right to the custody of the child expired at the death of its father, and that this right instantly devolved on the petitioner as its mother, unless it should be made to appear that she was "unfit for the trust."

But although the father may be dead, and the respondent have no legal right to the custody of the child, yet if the petitioner be in fact insane, or there be reasonable grounds to believe that she is insane, or liable to become so, she would be unfit to have the custody of the person or the care of the education of the child, and however painful, it would be the duty of the court to deny the prayer of her petition.

It is not distinctly averred in the return that the petitioner at the time of suing out the writ, or at any time since, was insane.

If this recital is to be treated as a distinct allegation that she was insane, and the same is to be held as admitted to be true, then the judgment of the circuit court was clearly right.

But where it is apparent from the record that proof of an existing fact essential to a correct determination of the controversy has been omitted, and that without such proof the court can never be satisfied that its conclusions are correct, and that this proof is within the reach of the parties, and

the condition of the pleadings will permit the same to be done without injury to the opposite party, the court will be warranted in delaying the hearing of the cause until the parties have an opportunity of supplying proof of such material fact.

We are therefore of opinion that, concerning a matter so essential to a correct determination of this controversy as the sanity and insanity of the petitioner, or unfitness in these respects, further inquiry should be made, and that the respondent should, if he so desires, have leave to amend his return, and the petitioner to make such answer thereto as they may be advised is proper to enable the court to determine the rights of the parties in the premises.

For the reasons hereinbefore stated, the judgment of the circuit court must be reversed, with costs to the plaintiff in error, and the cause remanded for further proceedings according to the principles settled in this opinion, and further according to law.

PARENT AND CHILD. — A father, during his lifetime, is liable for the maintenance of his minor children, and this liability is co-existing with a corresponding right to their services and earnings, and to their custody and control: *Magee v. Holland*, 27 N. J. L. 86; 72 Am. Dec. 341; *Earl v. Dresser*, 30 Ind. 11; 95 Am. Dec. 680. He may vindicate his right to their custody by *habeas corpus*, and it will be denied only when he is shown to be unfit to have such custody, or it appears that the permanent interests of the child would be sacrificed by a change in its custody: *In Matter of Scarlett*, 76 Me. 565; 43 Am. Rep. 768; *State v. Libbey*, 44 N. H. 321; 82 Am. Dec. 223; *Taylor v. Jeter*, 33 Ga. 195; 81 Am. Dec. 202; *Miller v. Wallace*, 76 Ga. 479; 3 Am. St. Rep. 48; *Jones v. Darnall*, 103 Ind. 569; 53 Am. Rep. 545; *Sturtevant v. State*, 15 Neb. 450; 48 Am. Rep. 349. For instances where the custody of a child was denied to its father because its best interests seemed to demand that it remain in the custody of other persons, see two cases last cited, and *Chapeky v. Wood*, 26 Kan. 650; 40 Am. Rep. 321; *State v. Smith*, 6 Me. 462; 20 Am. Dec. 330, and note 330-337. The father may by his voluntary contract release his right to the custody of his child, and transfer it to another: *Bently v. Terry*, 59 Ga. 555; 27 Am. Rep. 399; *Merritt v. Swimley*, 82 Va. 433; 3 Am. St. Rep. 115; *Miller v. Wallace*, *supra*; *contra*, *Brooke v. Logan*, 112 Ind. 183; 2 Am. St. Rep. 177; *State v. Baldwin*, 5 N. J. Eq. 454; 45 Am. Dec. 399. On the death of the father of a child, its mother becomes entitled to its custody, and no contract which he can make in his lifetime can impair this right: *Moore v. Christian*, 56 Miss. 408; 31 Am. Rep. 375.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

BROWN v. WILLIAMS.

[120 PENNSYLVANIA STATE, 24.]

RELEASE EXECUTED BY MECHANICS AND MATERIAL-MEN, DURING PROGRESS OF CONSTRUCTION OF BUILDINGS, OF "all manner of liens, claims, and demands whatsoever, which we, or any or either of us, now have, or might or could have, on or against the said buildings," operates to discharge the buildings from their liens for work done and materials furnished after as well as before its execution. It is an unconditional agreement to look to the personal responsibility of the owner in lieu of the structures.

SORTE FACIAS issued upon a mechanics' lien, filed by Lemuel L. Williams and John H. Cloak, doing business as Williams and Cloak, against Samuel H. Brown. The plaintiffs had a verdict and judgment, and the defendant brought error. The facts are stated in the opinion.

James M. Beck, for the plaintiff in error.

Frank S. Christian, for the defendants in error.

WILLIAMS, J. The first assignment of error raises the only important question in this case. The plaintiffs below contracted with Brown to lay the brick for nine dwelling-houses. Four of these fronted on Kensington Avenue, and five on Ruth Street. They were built to sell, and in order to enable Brown to make sales as opportunity offered, the mechanics and material-men executed to him a release of liens. The release recites that the subscribers "had erected four brick dwellings and stores" on Kensington Avenue, and had "agreed to release

all liens which we, or any or either of us, have or might have on said buildings" for work or materials furnished for their erection; and then declares that, in consideration of the premises, and one dollar in hand paid, "we have remised, released, and forever quitclaimed, and by these presents do remise, release, and forever quitclaim, unto the said Samuel H. Brown, and to his heirs and assigns, all and all manner of liens, claims, and demands whatsoever which we, or any or either of us, now have, or might or could have, on or against the said buildings and Samuel H. Brown and premises, for work done or materials furnished for erecting and constructing the said buildings." This was signed by more than twenty persons and firms, including the plaintiffs, and delivered to Brown.

The buildings were not finished at the date of the release, and the plaintiffs laid brick upon them after that time, amounting to about four hundred dollars, and filed a mechanic's lien therefor. A writ of *scire facias* was issued, and on the trial the plaintiffs alleged that a balance of one hundred dollars was still due and unpaid for the work done by them. This the defendant denied, and in support of this denial produced a receipt from the plaintiffs covering the alleged balance. He also offered the release signed by the plaintiffs and others for the purpose of showing that the plaintiffs had no right to recover on their mechanic's lien. The admission of the release was objected to as "irrelevant, and because all the work claimed for was done after the execution of the release." The court sustained the objection, and rejected the offer.

This was error. The release did not purport to be a partial release of the building, or to relate to work done prior to its date, but in express terms it released "all manner of liens, claims, or demands which we . . . have, or might or could have, on or against the said buildings, . . . for work done or materials furnished for erecting and constructing said buildings." The terms employed are apt and sufficiently comprehensive to do what they very clearly intended to do, viz., to free the buildings from all "lien, claim, or demand" for the materials furnished and work done on them. The date of such a release does not limit or restrict its operation. If made before the work began, or at any time during its progress, it is operative to discharge the building from lien as completely as though made after its completion. It is the whole building to which it relates, and not a part of it. It affects all the work

done or materials furnished by him who signs it, not a part of them; and it is an unconditional agreement to look to the personal responsibility of the owner in lieu of the structure. The release was therefore relevant, and was an answer to the writ of *scire facias*, which left the plaintiffs no standing whatever.

The judgment is reversed.

WAIVER OF MECHANICS' LIENS, GENERALLY: See the note to *Goble v. Gale*, 41 Am. Dec. 221-224.

PHILLIPS v. SWANK.

[120 PENNSYLVANIA STATE, 76.]

ABSENCE OF WORDS OF INHERITANCE IN EXECUTORY CONTRACT TO CONVEY LAND WILL NOT PREVENT PASSING OF FEE, but equity will supply the words where the consideration paid or other circumstances evince that no less than a fee was intended; although in a conveyance the word "heirs" is a term of art, and indispensable to carry a fee.

CONSTRUCTION OF INFORMAL INSTRUMENT, TRANSFERRING INTEREST IN REAL ESTATE, AS CONVEYANCE, OR AS EXECUTORY AGREEMENT TO CONVEY ONLY, depends, not upon any particular words and phrases it may contain, but upon the intention of the parties, derived from the instrument itself, and when that is doubtful, from the circumstances attending its execution; and in determining this intention, the first rule is to inquire whether the language imports a present conveyance, or contemplates a further assurance to pass the title.

INSTRUMENT IS TO BE CONSTRUED AS EXECUTORY AGREEMENT TO CONVEY, where the owner of land dated and signed a writing, not under seal, to the effect that "i do herby agree tht Jonathan Phillips shall have the land wich he is posession of now for labor he don for me over age and this shall be his wrecept for all my writes and claims against the land."

WRITTEN CONTRACT TO CONVEY LAND, TO SATISFY STATUTE OF FRAUDS, MUST BE IN SOME SENSE SUSTAINING; but it is sufficient if the land be described as that which the vendee "is in possession of now."

EJECTMENT. The opinion states the facts.

W. E. Crawford, E. P. Ingham, and A. L. Grim, for the plaintiffs in error.

E. M. Dunham, T. J. Ingham, and R. J. Thomson, for the defendant in error.

CLARK, J. This ejectment was brought to recover the possession of 250 acres of land, more or less, situate on the North Mountain, in Sullivan County. Both parties claim title under David Phillips, who some time prior to the year 1847 became the owner in fee. The plaintiff gave in evidence the record of an agreement for the sale of the land in dispute, by David

Phillips to Henry Swank, dated the 17th of October, 1863, and proved the payment of fifteen hundred dollars in full of the purchase-money. It was further shown that Swank went into and remained in the possession under his purchase until the 7th of April, 1881, when the defendants were found to be in the occupancy of a vacant house on the tract, claiming title to and possession of the whole tract.

To maintain the issue on their part, the defendants, who were sons of Jonathan Phillips, offered in evidence the record of a writing, in the words and form following, to wit:—

“August the 20, 1850:—i do herby agree tht Jonathan Phillips shall have the land wich he is posetion of now for the labor he don for me over age and this shall be his wrecept for all my writes and claims against the land.

[Signed]

“DAVID PHILLIPS.”

This offer to be followed by proof that Henry Swank purchased with notice of Jonathan Phillips's title, and that the land of which Jonathan Phillips was in possession at the date of this writing is the same land of which the defendants in this suit are now possessed.

This offer was refused, upon the ground that the writing was, in legal effect, an executed conveyance of the land, and as it contained no words of inheritance, it passed only a life estate to Jonathan Phillips, and was ineffective to vest any estate or right in the defendants at his decease.

If the writing referred to is to be construed as a complete conveyance of the land, the court was right in holding that an estate for life only would pass under it: *Gray v. Packer*, 4 Watts & S. 18. In a will, the force of the word “heirs” may be controlled by the context; but in a deed, it is a term of art, and indispensable to carry a fee: *Hileman v. Bouslaugh*, 13 Pa. St. 344; 53 Am. Dec. 474. So in an executory contract, the absence of words of inheritance will not prevent the passing of a fee-simple in equity, where it appears to have been the intention of the contract to convey a fee: *McFarson's Appeal*, 11 Pa. St. 511. Equity will supply words of inheritance, and imply a fee, where the consideration paid, or other circumstances, evince that no less than a fee was intended: *Defraunce v. Brooks*, 8 Watts & S. 68; *Ogden v. Brown*, 33 Pa. St. 250. The primary question in this case, therefore, is, whether the writing embraced in the defendants' offer is to be construed as a conveyance or an agreement to convey.

It is a well-recognized rule of construction that whether an

informal instrument transferring an interest in real estate shall be construed a conveyance, or an agreement only, depends, not upon any particular words and phrases it may contain, but on the intention of the parties, derived from the instrument itself; and when that is doubtful, from the circumstances attending its execution: *Kenrick v. Smick*, 7 Watts & S. 41; *Bortz v. Bortz*, 48 Pa. St. 882. The intention is so imperative that even the strongest words of conveyance in the present tense will not pass the legal estate, if other parts of the instrument show that this was not the intention of the parties: *Williams v. Bentley*, 27 Id. 301. On the one hand, technical words of present conveyance are not necessary to constitute an executed contract; if the intention is plain, it is sufficient; and on the other hand, even though technical words of present grant are used, yet, if by reason of something further remaining to be done, or from the tenor of the whole instrument, the design of the parties is manifested that the contract is executory merely, it will be so construed.

In determining this intention, *ex visceribus*, the first rule, however, is to inquire whether the language imports a present conveyance, or whether, collecting all its parts, it contemplates a further assurance to pass the title: *Bortz v. Bortz*, *supra*. Applying this rule in the construction of the writing offered in this case, it is plain that there are no technical or other words of present conveyance. By its terms, David Phillips "agrees" that Jonathan "shall have" the land which is designated as "the land he is in possession of now," without any formal or further description whatever; he is to have the land for the labor he did for his father after the years of his majority, and it is provided that "this shall be his receipt," etc. Although David Phillips was the owner in fee, and the "receipt" was for all his "rights and claims against the land," there are no words of inheritance, or words indicating the succession to the title at Jonathan's death. If the parties intended the writing for an executed contract, then but a life estate passed. That such an effect was the design of the parties, in view of the language just quoted, it is difficult to believe; for it is obvious that David Phillips intended to convey his entire estate, and his title was in fee. The instrument is not styled a deed or a conveyance; it is in the nature of an agreement; it is of the most informal character; it does not disclose the slightest efforts to adopt the orderly parts of a conveyance. It is not under seal; indeed, it bears upon its face the most distinct and

unequivocal marks of an executory contract; it is nothing more or less than a receipt for the purchase-money of the land, and an agreement to convey in consideration thereof.

Nor do we regard the case as coming within the statute of frauds. It is true, a written contract, in order to comply with the statute, must be in some sense self-sustaining. "It would be mere folly," as was said in *Morris v. Stephens*, 46 Pa. St. 200, "to make a conveyance to my next-door neighbor, or to the person now sitting at the table with me, by this description, instead of by name; the law could hardly be expected to enforce such a conveyance in the face of the statute which requires conveyances to be in writing and to be self-sustaining, with the exception only of such necessary uncertainty as is involved in their application to persons named and things described." There is, as intimated in the language of the case referred to, a necessary uncertainty in writings, involved in their application, not only to persons but to things described therein. If there are two or more persons of the same name, it may be necessary by parol proof to fix the identity of the person intended, or the thing concerning which the parties propose to contract may be described in such general terms as to require parol proof to identify the particular subject of the contract. It is quite impossible in most cases so to describe land as to avoid the necessity of parol proof for its identification; for, whether it be described by metes and bounds, by monuments erected upon the ground, or by adjoiners, its identification necessarily becomes the subject of parol proof. In this instance, the lands agreed to be conveyed were described as the land of which Jonathan was at the time in the actual occupancy and possession; this was no more open to the objection stated than if it had been described by its adjoiners, or by marks upon the ground.

Upon an examination of the whole case, we are of opinion that the defendants' offers should have been received, and that the court erred in excluding them.

The judgment is therefore reversed, and a *venire facias de novo* awarded.

EQUITY WILL SUPPLY WORDS OF INHERITANCE TO PERFECT DEED which is supported by valuable and meritorious consideration, but will not do so in the case of a voluntary deed: *Powell v. Morisey*, 98 N. C. 426; 2 Am. St. Rep. 343, and note.

DESCRIPTION OF LAND IN MEMORANDUM, SUFFICIENCY TO SATISFY STATUTE OF FRAUDS: See *Hurley v. Brown*, 98 Mass. 545; 96 Am. Dec. 671, and note 675.

NORTH v. WILLIAMS.

[120 PENNSYLVANIA STATE, 109.]

FACT THAT PARTY COULD NOT READ OR WRITE DOES NOT PREVENT APPLICATION OF RULE THAT WRITTEN CONTRACT DULY EXHIBITED, after its contents were explained, cannot be overthrown upon the mere opposing testimony of one party, contradicted by the oath of another, especially where the latter is a disinterested person.

AGENT OF LESSORS OF PIANO, WHO OBTAINS ENTRANCE INTO LESSEE'S HOUSE BY FALSELY REPRESENTING THAT HE WANTED TO TUNE PIANO, when he intended to and did remove it, using no violence in so doing, is not guilty of a trespass, nor is the taking unlawful, when the contract between the parties provided that upon default of payment of any installment of rent the lessee should redeliver the piano to the lessors or their authorized agent, "or permit their agent to enter into and upon any premises where said piano may be, and without let or hindrance take away the same"; and no exhibition by the agent of any written authority, nor any previous demand for the piano, the installments of rent having previously been demanded, is necessary.

TRESPASS by Clayton Williams against F. A. North & Co., dealers in pianos and organs in the city of Philadelphia. On October 2, 1884, North & Co., through their agent, George Miller, entered into a written agreement with Williams, by which they leased to Williams a piano for the term of twenty-five months, at a rental of \$150, payable ten dollars cash in hand, and the balance in monthly installments of five dollars on the second day of each month. The agreement, among other things, provided that Williams "will, at any time when required, exhibit the said piano to the said party of the first part, or their agents; and in default of any monthly payment, the said lessee agrees to redeliver said piano to the said F. A. North & Co., or their authorized agent, within five days after such payment shall become due, or permit their agent to enter into and upon any premises where said piano may be, and without let or hinderance take away the same." It also contained a provision for the sale of the piano to Williams, if, at any time during the term, or at its expiration, he should wish to purchase it, upon the payment of such sum as would, with previous payments of hire, amount to the sum of \$150; and finally provided that "it is hereby expressly understood and agreed by and between the said parties to this agreement that no title to the said piano, either legal or equitable, shall vest in the said party of the second part, except as lessee under the agreement, until the terms of purchase, as above provided, have been complied with, and the aforesaid bill of sale has

been duly delivered by the said F. A. North & Co." Williams affixed his mark to the agreement, and also to a provision at the end, as follows: "I have received a copy of the above agreement, and have no understanding, verbal or otherwise, differing from it." Williams paid in all about seventy-six dollars; but having made no payments for several months, North & Co., in May, 1886, sent an agent to take away the piano. Williams testified that this agent came to his house and rang the door-bell. The witness was in the kitchen, and when he got to the vestibule door, the man was in the entry. The witness asked him what he wanted, and he replied that he had come to tune the piano. The witness told him to wait, and he (witness) would bring his wife. When the witness returned to the parlor, the man and two others were removing the piano. The witness objected, and asked the agent for his authority. The agent replied that he had all the authority he wanted. Williams further testified that Miller said, at the time the agreement was made, that the witness had three years to pay for the piano; and on cross-examination, he testified that he did not tell Miller that he could not read or write. Miller testified that he explained the agreement to Williams, but did not read it to him, as Williams was in a hurry, and did not ask it. He denied telling Williams that Williams would have three years to pay for the piano. North testified that he instructed his agent to get possession of the piano, because Williams was in arrears in the payment of installments. There was no evidence that any force or violence was used in the removal of the piano. The plaintiff had a verdict; and judgment being entered thereon, North took this writ, assigning that the court erred: 1. In answering his first point, viz.: The agreement between plaintiff and defendant being a bailment, the plaintiff was bound to pay the rent as it accrued, according to the terms of the agreement, and in default of such payment, defendant had the right to take the piano; to which the court answered that the defendant had no right to take the piano by force, although he might have taken it by coming and showing authority; 2. In answering his third point: The agreement being a bailment, and the evidence showing that the plaintiff was in arrears in the payment of rent under its terms, the verdict should be for the defendant; to which the court answered that the three years' time would have no application to this point, and that it was true that the plaintiff was in arrears, and was bound to give

up the instrument whenever the defendant should demand it in a proper manner; 3. That the court erred in charging the jury that if Miller failed to explain to the plaintiff what was in the contract, and that there could be no verbal contract, the plaintiff was not bound by the written contract; and if there was an agreement to extend the contract for three years, and if Miller failed to explain to the plaintiff that no verbal contract was binding, then the plaintiff could recover on the fact that the verbal contract was still in force; but the jury must be thoroughly satisfied that there was such a verbal contract outside of the written one; 4. That the court erred in charging the jury that the real question was, whether the defendant exerted his rights improperly in the mode in which he got possession of the piano; and in the view the court takes of the agreement, and in view of the undisputed evidence, the defendant did not exercise his rights in a proper manner; the agents of the defendant, by a trick, obtained entrance into the house; he should have made some sort of demand, and if the demand was refused, he had all his legal rights, as owner of the piano, against the person holding it; 5. That the court erred in charging the jury that the defendant obtained the piano in an illegal way; and this is not a case which would call for high punitive damages; but it cannot be said, as a matter of law, that no punitive damages can be given.

Franklin Swayns and Charles F. Hinckle, for the plaintiff in error.

Levin W. Barringer, for the defendant in error.

GREEN, J. There is no evidence in this case upon which it would be possible to reform the contract between the parties. It is in writing, and was duly executed in the presence of an attesting witness. It speaks for itself, and cannot be overthrown upon the mere opposing testimony of one party, contradicted by the oath of the other, who in this case was a disinterested person. The learned court below thought that this rule did not apply because the plaintiff could not read or write, and that there was conflicting testimony as to whether the contract was explained to the plaintiff at the time of the execution. The plaintiff did not testify that he could not read or write, but he did say that he did not tell Miller, defendant's agent, that he could not read or write. This, however, is immaterial, because Miller testified positively that he

did explain the agreement to the plaintiff, and the latter did not deny it, nor did he say that he did not understand it. He certainly did understand that it was for the acquisition of a piano at a price fixed, payable in monthly installments of five dollars each. The only thing he speaks of as being different from the written instrument is, that the agent said he was to have three years to pay for the piano. But he does not say that, even as to this, there was any positive agreement to that effect, or that on the faith of the assertion he executed the contract. It was error, therefore, to submit to the jury the question as to what the contract was, and this sustains the third assignment.

Some stress is laid in the argument upon the point that the man who took away the piano did not show his authority to do so. But the plaintiff himself testified that "he said he had all the authority he wanted," and the defendant testified that he instructed his agent "to get possession of the piano, because Williams was in arrear in the payment of installments." It was not necessary that the agent should have or should exhibit any authority in writing.

The only remaining matter to be considered is the manner in which possession of the piano was taken. The court below held that it was obtained illegally, because the defendant's agent told the plaintiff he wanted to tune the piano, when in truth he wanted to remove it. The idea, as expressed in the charge, is, that because entrance was obtained by means of a falsehood, the defendant's agent was a trespasser, and the defendant was liable, not merely for the technical trespass of entering the plaintiff's house without his permission, but also for taking away the piano, and even for punitive damages. A careful examination of the testimony convinces us that this was an erroneous view to take of the case. The contract expressly provided that in default of payment of any installment, the lessee should redeliver the piano to the plaintiff or his authorized agent within five days after the default, "or permit their agent to enter into and upon any premises where said piano may be, and without let or hindrance take away the same." Under this stipulation it is plain that the plaintiff was under an obligation after five days' default in delivery to permit the plaintiff or his agent to enter the premises and remove the piano. If this was the plaintiff's duty, it is difficult to see how he can acquire a cause of action as for a trespass, even if entrance was obtained by means of a false statement. He was

bound to grant the entrance merely because he was in default, and whether the true or a false reason was given when entrance was asked, if he conceded it, the entry could not be a trespass. The subsequent taking of the piano could not be a trespass, because that was a contract right expressly given, and if consent was given to the mere entrance upon the premises, the fact that a false reason for desiring it was given would not convert it from a consentible into a non-consentible entrance. If a citizen desired to see another upon business which he knew to be unpleasant to the latter, and chose to assign some other than the real reason for asking admission, he certainly would not become a trespasser merely because he failed to give the true reason.

In the present case, however, there is not under the testimony any sufficient reason for saying that entrance was obtained by a falsehood. The plaintiff himself testified: "A man came to my house and rang the door-bell. I was in the kitchen, and when I got to the vestibule door, the man was in the entry." It would seem, therefore, that the man was already in the house when the plaintiff first saw him. The witness proceeds: "I asked him what he wanted. He said he had come to tune the piano. I told him to wait and I would call my wife." It is manifest that the falsehood was not made use of until after entrance had been obtained, and it cannot therefore qualify the fact of entrance. While entrance before the bell was answered might, in strictest sense, be regarded as a technical trespass, it would certainly by itself be *damnum absque injuria* in any case; but here it was effected in the exercise of a lawful right to have entrance in this particular house for the performance of a contract right, and in such circumstances could not be viewed as an illegal act.

The subsequent subterfuge was of no consequence in any way. No violence or unnecessary force was used, and all that was done was precisely what the defendant had a legal right to do, to wit, "without let or hindrance take away the same." As to a demand being made, the very act of taking the piano was a demand for it. Repeated demands had previously been made for the money which was overdue and unpaid, but without success, and the only remaining demand to be made was for the instrument itself. Both the plaintiff and his wife said at the time the piano was taken that they were willing to pay and would pay the balance due, but in point of fact they neither did pay nor tender payment of any actual money or

its equivalent. The defendant and his salesman both testified that they subsequently offered to return the piano if the balance due was paid, and this is not contradicted, but no more money was ever paid or tendered. All the assignments of error except the second are sustained.

Judgment reversed, and new venire awarded.

ILLITERACY IS NOT GROUND FOR AVOIDING INSTRUMENT, if parties were able to understand it, and its contents were explained to them: *Diagrams v. Salene*, 15 Or. 208; 3 Am. St. Rep. 152.

CONWAY v. LEWIS.

[120 PENNSYLVANIA STATE, 21A.]

CONSIGNMENT OF GOODS TO FACTORS FOR SALE, WITHOUT INSTRUCTIONS AS TO PRICE, CONFERS UPON THEM RIGHT TO EXERCISE THEIR JUDGMENT in the sale, and they were neither bound to write for instructions, nor, having written, to wait for a reply before selling.

ACTION by Charles H. Lewis against John M. Conway & Co. to recover damages for an alleged unauthorized sale of yarn which had been consigned by the plaintiff to the defendants. The plaintiff had a verdict and judgment, and the defendants brought error. The opinion states the case.

William B. Lane, for the plaintiffs in error.

Joseph J. Knox, for the defendant in error.

WILLIAMS, J. Conway *et al.*, defendants below, were commission merchants. Lewis consigned three bales of yarn to them for sale. It was represented to be a twenty-cut yarn worth at that time about forty-five cents per pound. The bales were tested by reeling and weighing samples from them, and the yarn, as Conway alleges, was found to be not an even twenty-cut, but an uneven and inferior article ranging from eighteen to thirty cuts. Efforts were made by Conway *et al.* to sell the yarn, but the highest price offered was, as they allege, thirty cents per pound. They wrote to Lewis the result of their efforts to sell, and the price they were offered, and asked for instructions, but before an answer was received they decided to close out the consignment at the price offered, and made the sale accordingly. Lewis denies that the yarn was an uneven and inferior article, insists that it should have brought forty-five cents, and brings this suit to recover the

difference between that price and the price at which it was sold.

At the conclusion of the evidence on the trial in the court below, the defendants submitted a series of points, in the first of which they asked the court to instruct the jury that "unless the jury can find from the evidence that the defendants were guilty of breach of orders, fraud, or negligence, then the verdict must be in their favor." This was affirmed without qualification. The second point narrowed the general proposition contained in the first to meet the defendants' view of the evidence, and asked the court to say that "there is no evidence of breach of orders or fraud on part of defendants, therefore it must be proved that they were guilty of negligence to entitle the plaintiff to recover." To this the learned judge replied: "I affirm this point with a qualification: if the defendants wrote for orders, and sold before getting them, while this was not a sale against orders, yet it was a sale without orders, and would constitute negligence on the part of the defendants."

We cannot agree to this definition of negligence. The consignment of the goods to the defendants for sale, without special instructions and without limit as to price, conferred upon them the right to exercise their own judgment in the sale. They were bound to the use of their best judgment in view of all the circumstances, and were neither bound to write for orders, nor, having written, to wait for a reply. It might have been prudent to wait for the reply, but their duties as factors were not changed, nor their powers diminished, by the fact that they had written for directions. Until the answer was received, they were at liberty to sell upon their own judgment, and if acting in good faith, were entitled to protection. The general rule is clearly stated in *Smedley v. Williams*, 1 Pars. Eq. Cas. 364, in these words: "If the consignor desires to limit the price at which his goods are to be sold, he should say so in express terms, and if he omits to do so, the consignee has the right to consider the sale of the goods as referred to his discretion."

If the consignees had not exercised their discretion before instructions came, then the directions of the owner set the limits within which their discretion must thereafter be confined; but if they had made the sale, the questions were whether they had acted in good faith, and with a due regard to the duty they owed the consignors. This was for the jury

under the evidence in this case, and should have been submitted to them. The assignments of error all relate to this subject, and are all sustained.

Judgment reversed, and *venire facias de novo* awarded.

RIGHTS AND LIABILITIES OF FACTORS IN GENERAL: See the note to *Bigelow v. Walker*, 58 Am. Dec. 158-171. Implied agreement between factor and principal is, that former will sell to the best advantage: *Vicent v. Ratler*, 31 Tex. 77; 98 Am. Dec. 516.

APPEAL OF PEPPER.

[120 PENNSYLVANIA STATE, 285.]

POWER OF APPOINTMENT GIVEN BY TESTATOR TO HIS SON DOES NOT AUTHORIZE APPOINTMENT OF FORFEITABLE ESTATE TO APPOINTEE, OF the creation by the donee of a spendthrift trust, but the appointee takes an indefeasible estate in fee under the will, he being the only member of a class to which the estate was limited by the will, where a testator gave the share of a son to trustees, in trust for his use for life, "and from and after his death, then to the use of such of his children and issue, and in such shares and for such estates, as he shall by last will appoint, and in default of such appointment, then to the use of all of his children that may be living at his death," etc., and the son afterwards died, leaving as his only issue a child born after the death of the grandfather, and by his will appointed to such child an estate in the nature of a conditional fee, subject to forfeiture for breach of condition against alienation.

APPEAL from the orphans' court. The facts are stated in the opinion.

John G. Johnson and William B. Robins, for the appellant.

J. B. Townsend, for the appellee.

PAXSON, J. This is a close case, and not free from difficulty. It was heard in the court below upon exceptions to the rulings of the auditing judge. The court were divided, and the exceptions fell. Two opinions have come up with the record, one of them sustaining the adjudication, the other sustaining the exceptions. They are both able and carefully prepared opinions. It is a pleasure to consider cases where the court below has done so much to aid us in our deliberations.

The single question presented by the record is, whether there has been a valid execution of the power of appointment under the will of George Pepper. The testator devised the share of his son Charles to trustees, in trust for his use for life, "and from and after his death, then to the use of such of

his children and issue, and in such shares and for such estates, as he shall by last will appoint, and in default of such appointment, then to the use of all his children that may be living at his death, and the issue of any deceased child or children, their heirs, executors, or administrators, as tenants in common, in equal shares; the issue of any deceased child to stand in the place of their parent, and to take only the share their parent would have taken if living; and in default of such issue, then as to the one equal fourth part of the share appertaining to my son, to the use of such person or persons, and for such estates and in such proportions, as he shall in any way appoint; and as to the remaining three-fourths parts, and also as to the said one-fourth part, so far as the same shall not have been appointed otherwise by my said son, to the use of my then surviving children, and the issue of any of my children then deceased, in the shares and proportions, and for the estates which they would have taken under the intestate law of Pennsylvania if my said son had died seised in fee-simple of such estate, without any wife surviving him."

Charles Pepper left surviving him one child, Charles Rockland Pepper, and no other issue. His said son was born after the death of George Pepper. He is now about forty years of age, and has never been married. It is very clear that, under the will of George Pepper, his son Charles took an estate for life, with remainder in fee to his son, Charles Rockland Pepper. This estate is indefeasible, unless it has been abridged by the donee of the power in the valid execution thereof.

It is well to bear in mind that whatever Charles Rockland Pepper takes, he takes it under the will of his grandfather. The donee of the power, Charles Pepper, had no estate to give him. Nor can he take anything from him. The estate was limited by the will of George Pepper to a class to which Charles Rockland Pepper belongs, and he is moreover the only member of that class. Had there been other children, brothers and sisters of Charles Rockland Pepper, the donee of the power could have appointed the estate among them in such shares as he might have seen proper. He might perhaps have excluded this one child from all participation in his grandfather's estate. As the case stands, the donee of the power can neither exclude him nor diminish his interest or estate, because, as was before observed, the estate was given by George Pepper to a class of which Charles Rockland Pepper is the only representative or member. Charles Pepper cannot give it to

any one else, because it is not his to give; he is the mere donee of a power; that power has its source in the will of George Pepper; it is a special limited power, and it can only carry the estate to such persons as George Pepper directed it to go. The object of conferring this power was to enable Charles Pepper to distribute the estate to and among a certain class, or to such members of the class as he might think best for their interests. With but one member of the class in existence, there can be but one distribution, and under such circumstances it is difficult to see the utility of any appointment whatever.

Charles Pepper, however, attempted to exercise the power of appointment given by the will of George Pepper. That the paper was carefully drawn is shown by the skill with which a perpetuity is avoided while approaching dangerously near the border. The material part of the execution of the power by Charles Pepper is in the following words:—

“Until the expiration of twenty-one years after the death of the survivor of my brothers, George S., Edward, Lawrence S., and Fredrick Pepper, of my sister, Mrs. Catharine Gardette, and of myself, all of whom were living at the death of my said father, I devise, bequeath, and appoint my said share in my father's estate to my said son, Charles Rockland Pepper, upon the express condition that he shall not in any manner convey, assign, or transfer the same, or the rents, issues, and profits thereof, to any person whosoever, or do or suffer any act, matter, or thing whereby the same shall be attached, seized, or taken in execution, or be made subject to or be affected by the insolvent or bankrupt laws of the United States, or of any other state thereof, or of any foreign country; and in case any of these events shall happen contrary to the true intent and meaning of the foregoing condition within the said term of twenty-one years after the death of the survivor of my said brothers, sister, and myself, and also in case my said son shall die before the expiration of the said term of twenty-one years, leaving issue, then, and in any such case, I devise, bequeath, and appoint my said share in my father's estate to such issue, their heirs, executors, and administrators, and if more than one, in such shares and proportions as if my said son had died seised and possessed thereof intestate.”

It is not easy to describe the estate which the donee of this power has given to the appointee. It is perhaps a conditional fee, subject to forfeiture for breach of the condition against alienation. The thought naturally suggests itself, Where did

Charles Pepper get the power to annex a forfeiture to the estate he was attempting to appoint? It was not inherent in him by virtue of his dominion over the estate, for, as before observed, it was not his estate. It was urged, however, that it created a spendthrift trust, and as such may be sustained under the authorities in this state. But the appointment contains no trust of any kind, and to sustain this assumption we would have to write a spendthrift trust into the will of George Pepper. This cannot be done either by the donee of the power or by this court. We look in vain through the will of George Pepper for one word which authorizes the donee of the power to appoint a forfeitable estate to Charles Rockland Pepper, or create a spendthrift trust. It is true it authorizes the donee to appoint the share referred to "in such shares and for such estates" as he shall deem proper. But the testator when he used this language was contemplating the distribution of the share among a class consisting of several persons, certainly of more than one. And had there been several of the class, the donee of the power could have appointed an estate for years to one, an estate for life to another, with remainders to the third in fee, or he could have made any other division which would have given the whole share to some one or more of the class. This is what the testator evidently meant when he used the words "for such estates." They have no meaning as applied to Charles Rockland Pepper as the only member of his class, unless we hold that they were intended to authorize the donee of the power to cut down the estate which he took under his grandfather's will from an estate in fee to an estate upon condition and forfeitable for alienation. This we are not prepared to do.

A careful reading of the will of George Pepper leaves us in no doubt as to the testator's meaning. The share of his son Charles was to go in the line of inheritance. In default of appointment by the latter, the share is limited to the class who would take by descent from Charles; and we are of opinion that that class was to be determined upon the death of Charles. When George Pepper died, Charles had no children. He could not possibly know how many children Charles would leave. He therefore gave his share "to the use of such of his [Charles's] children and issue . . . as he shall by last will appoint," and upon failure to appoint, "then to the use of all his [Charles's] children that may be living at his [Charles's] death." We think it is plain that the testator intended the

share of Charles to go to such of the children of Charles as might be living at the death of the latter, and to the issue of any deceased child. This was the class who were to take, and the power was given merely to enable Charles to make distinctions between the different members of the class, in case some should prove more worthy or more needy than others, or possibly to exclude some altogether. We see nothing to justify the donee of the power in giving to Charles Rockland Pepper a forfeitable estate, with remainder to another class not contemplated by the testator, which was not then, is not now, and may never come into existence. We think the foregoing views are fully sustained by *Wickersham v. Savage*, 58 Pa. St. 385; *Horwitz v. Norris*, 49 Id. 213; *Fidelity Co.'s Appeal*, 4 Week. Not. 266.

The decree is affirmed, and the appeal dismissed, at the costs of the appellants.

POWER OF APPOINTMENT MUST BE EXERCISED IN GOOD FAITH, and for the purpose designed: *Cruss v. McKee*, 2 Head, 1; 73 Am. Dec. 183.

KINPORTS v. BOYNTON.

[120 PENNSYLVANIA STATE, 308.]

VENDOR'S INTEREST IN LANDS CONTRACTED TO BE SOLD IS BOUND BY LIEN OF JUDGMENT recovered against him while the contract is unexecuted, to the extent to which it is unexecuted.

ASSIGNMENT BY VENDOR OF LANDS IS IN LEGAL EFFECT MORTGAGE, leaving in him a right of redemption, when it is of his claim for the unpaid purchase-money of the lands contracted to be sold, "together with all my interest and legal estate in the land," as collateral security merely.

VENDOR'S RIGHT OF REDEMPTION IS BOUND BY LIEN OF JUDGMENT subsequently recovered against him, where he makes a contract to convey the lands, and assigns his claim for the unpaid purchase-money, "together with all my interest and legal estate in the land," as collateral security, thus creating a mortgage.

EVIDENCE IS COMPETENT TO SHOW THAT DEBT REPRESENTED BY PLAINTIFF'S JUDGMENT WAS PRIOR IN POINT OF TIME to an unrecorded conveyance of the legal title as collateral security, held by the terre-tenant, against whom it is sought to revive the judgment in a proceeding by *scire facias*.

SCIRE FACIAS by Porter Kinports against Jonathan Boynton, terre-tenant, to revive the lien of a judgment recovered by Porter Kinports against Gideon R. Kinports. Gideon R. Kinports, as more fully shown in the opinion, had owned the land in controversy, and had made a contract to sell it to

Thomas Tozier. He afterwards, by a writing under seal, assigned the purchase-money due to him from Tozier, "together with all my interest and legal estate in the said land, with right to proceed in his own name, and right for the collection of the same by ejectment or otherwise," to John W. Williams, as collateral security. Williams, in turn, made a similar assignment to the defendant, Boynton. Neither assignment was recorded. Boynton subsequently obtained possession of the premises in an action of ejectment against Tozier, to enforce the payment of the purchase-money due from Tozier. After Gideon R. Kinports had made the assignment to Williams, the judgment in question was recovered against him by Porter Kinports. In this proceeding by *scire facias*, a judgment for want of an affidavit of defense was entered. The court subsequently struck off the judgment as to Boynton, upon his petition and plea that the judgment sought to be revived was never a lien upon the land in question. At the trial, on this plea, the foregoing facts appeared in evidence. The defendant had a verdict and judgment, and the plaintiff brought this writ, assigning that the court erred: 1. In rejecting the plaintiff's evidence that the debt represented by the plaintiff's judgment was incurred prior, in point of time, to the assignment to Williams; 2, 6, and 7. That the court erred in its charge to the jury that the assignment to Williams did not constitute an unrecorded mortgage, leaving an interest in the assignor which might be bound by a judgment recovered against him for a debt existing prior to such assignment; 3, 4, 5, and 8. That the court erred in its charge that nothing remained in the assignor after such assignment which could have been bound by the plaintiff's judgment; 9. That the court refused to charge that the verdict should be for the plaintiff; and 10. That the court gave a binding instruction to find in favor of the defendant.

Frank Fielding, John H. Orvis, and J. Frank Snyder, for the plaintiff in error.

Joseph B. McEnally and Daniel McCurdy, for the defendant in error.

PAXSON, J. This proceeding in the court below was a *scire facias* to revive and continue the lien of judgment No. 485, September term, 1876, in which Porter Kinports was plaintiff, and Gideon R. Kinports defendant. This judgment was entered of record August 11, 1876. On November 17, 1885, a

judgment, for want of an affidavit of defense, was entered against the said defendant, and Jonathan Boynton as terre-tenant, in the *scire facias*. Subsequently an application was made to the court below by Boynton to strike off the judgment as to him, upon the ground that he was not a terre-tenant, and that the judgment had never been a lien upon the particular real estate in controversy. We need not refer to these proceedings in detail; they are not very clearly stated, but appear to have resulted in an issue to try this question, and a verdict in favor of the terre-tenant in conformity to a binding instruction of the court.

The question we have to determine is, whether Gideon R. Kinports had such an interest in this particular real estate at the time the original judgment was entered as was bound thereby; and if so, whether the same was bound by the judgment on the *scire facias* as against Jonathan Boynton as terre-tenant.

The real estate which the plaintiff claimed was bound by the lien of his judgment consisted of a tract of land of about 265 acres. It is undisputed that Gideon R. Kinports was the owner of this land in 1874, and that on October 8th of that year he entered into a written contract with Thomas Tozier by which he agreed to sell the said tract of land to the said Tozier for the consideration of twenty-two thousand five hundred dollars, payable by installments; that of these installments, six thousand dollars only was paid; that on May 29, 1875, Gideon R. Kinports, by a writing duly executed, assigned the purchase-money due him from Tozier, as well as his legal title to the said real estate, to John W. Williams, and that the said Williams, on October 14, 1876, assigned the same to Jonathan Boynton. Each of these assignments upon its face shows that it was as collateral security merely, and that the sum intended to be secured was several thousand dollars less than the purchase-money remaining unpaid. Neither assignment was recorded. We may further state, as a part of the history of the transaction, that on March 9, 1875, G. R. Kinports brought an action of ejectment against Thomas Tozier, upon the legal title, to enforce the payment of the balance of the purchase-money, to which action the name of Jonathan Boynton was subsequently added as a plaintiff. This action was so proceeded with that a verdict was rendered for the plaintiff, to be released upon the payment of \$15,510. A judgment was entered upon this conditional verdict, which

subsequently became final, and a writ of *habere facias possessionem* was issued April 18, 1878, and the writ executed by delivering the premises to Jonathan Boynton.

The legal effect of the agreement between Gideon R. Kinports and Thomas Tozier, of October 8, 1874, was to place the equitable title in Tozier, while the legal title remained in Kinports as security for the unpaid purchase-money. A judgment in this state binds the equitable as well as the legal title, hence it needs neither argument nor the citation of authority to show that the interest of Kinports or Tozier in the premises in question would be bound by the lien of a judgment so long as the contract remained unexecuted, and to the extent that it was unexecuted.

If, on August 11, 1876, the day when the judgment, No. 485, September term, 1876, was entered, Gideon R. Kinports had parted with his entire interest in the property, there would have been nothing to which the judgment could have attached as a lien. The assignment to Williams, however, was not an absolute conveyance of either the legal title or of the unpaid purchase-money. It was, as before stated, merely an assignment as collateral to secure a debt less than the purchase-money remaining unpaid, while the assignment from Williams to Boynton was of the same character. This left a resulting interest in Kinports which was subject to the lien of a judgment. A judgment obtained against the vendor of land, after the execution of an article of agreement, but before the execution of a deed, binds the legal estate of the vendor; and on a sale under such judgment the sheriff's vendee stands precisely in the situation of the original vendor, and is entitled to the unpaid purchase-money, payment of which he may enforce by ejectment against the terre-tenant: *McMullen v. Wenner*, 16 Serg. & R. 18; 16 Am. Dec. 543; *Fasholt v. Reed*, 16 Serg. & R. 266; *Catlin v. Robinson*, 2 Watts, 373; *Wilson v. Stowe*, 10 Id. 437; *Stewart v. Coder*, 11 Pa. St. 90.

The right which Gideon R. Kinports had in the real estate after the assignment to Williams was the right to a reconveyance of the property after the payment of the debt which the assignment was intended to secure. It appears that the debt has not been paid, and the learned judge below was of the opinion that because it has not been paid, G. K. Kinports had a mere possibility which has never happened, and therefore he had no interest when the judgment was entered against him. But he had a right to pay the money, and thus redeem

the pledge, and when so redeemed, to a reconveyance or return of the property pledged. His judgment creditor would have the right to sell the property subject to the pledge, and the purchaser at such sale would be entitled to stand in Kinports's shoes, and redeem. Whether such right would be of any value is not to the purpose. There was an interest, valuable or otherwise, to which the lien of the judgment attached, and we are of opinion it was error to instruct the jury to find for the defendant.

Moreover, we are of opinion that the assignment by Gideon R. Kinports to John W. Williams was in legal effect a mortgage. It was an assignment of the purchase-money of the real estate therein described and mentioned, "together with all my interest and legal estate in the land," etc., as collateral security merely. This interest was of such a character, as before remarked, as to be liable to the lien of a judgment. It was equally capable of being conveyed or mortgaged. It was assigned to Williams as a mere pledge. It is well settled in this state that an assignment or conveyance to secure an existing debt or future advances is but a mortgage without regard to its form. It is so if absolute upon its face: *Kellum v. Smith*, 83 Pa. St. 158; *Rhines v. Baird*, 41 Id. 256; *Myers's Appeal*, 42 Id. 518; *Harper's Appeal*, 64 Id. 315; *McClurkan v. Thompson*, 69 Id. 305; *Fessler's Appeal*, 75 Id. 483.

We hold that the assignment in question is but an unrecorded mortgage. What effect it may have in any future contest is a matter not now before us. It is sufficient to say that it leaves no doubt in our minds as to the right of the plaintiff to revive his judgment against this land, and Jonathan Boynton as terre-tenant, to the extent of Kinports's interest, whatever it may be.

We think that in view of what was said in *McLaughlin v. Ihmsen*, 85 Pa. St. 364, it was competent for the plaintiff to show that the debt represented by his judgment was prior in point of time to the assignment to Williams, and that it was error to reject the evidence referred to in the first assignment. We also sustain the second, third, fourth, fifth, sixth, seventh, eighth, and tenth assignments.

Judgment reversed, and a *venire facias de novo* awarded.

LIEN OF JUDGMENT ATTACHES TO INTEREST OF VENDOR of land contracted to be sold to the extent of the unpaid balance of purchase-money: *Filley v. Dameron*, 1 Neb. 334; 93 Am. Dec. 337.

BENNETT v. MORRISON.

[120 PENNSYLVANIA STATE, 390.]

MERE RECOVERY OF JUDGMENT BY VENDOR AGAINST VENDEE IN EJECTMENT TO ENFORCE CONTRACT FOR SALE OF LANDS DOES NOT RENDER VENDEE'S POSSESSION THEREAFTER ADVERSE and hostile to the vendor, so as to set in motion the statute of limitations, no proceedings having been taken to enforce the judgment.

CASE IN EJECTMENT SHOULD NOT BE WITHDRAWN FROM JURY, AND VERDICT FOR PLAINTIFF DIRECTED, even though the defendant's evidence is contradicted, where, in support of the defendant's claim of title by adverse possession, he testified that more than twenty-one years before suit he purchased possession from one who was in possession under a contract of sale, and had ever since held possession as his own, paying no rent, and paying the taxes.

EJECTMENT brought August 19, 1884, by Mary C. Morrison against Joseph C. Bennett and Ann Bennett, to recover a certain lot of land in the borough of Warren. It was admitted that prior to 1862, Mrs. Rachael Weatherby was the owner of the land, and should be treated as the common source of title. The plaintiff claimed title through a deed from Mrs. Weatherby to James Bennett, a brother of the defendant Joseph C. Bennett, dated October 25, 1875, in pursuance to a contract of sale dated April 9, 1864; and a deed from James Bennett and wife to the plaintiff, dated October 3, 1883. The defendant Joseph C. Bennett, to show title in himself, testified that in 1862 one Chester Dennison was in possession of the lot, and built a house thereon; that about August 1, 1863, the witness paid Dennison fifteen dollars for the possession, and Dennison delivered up the key of the house to the witness; that on August 4, 1863, the witness let one Charles Hill move into the house, and remain there until April 1, 1864, when the witness moved in, and had been in possession ever since; that the witness claimed to own the property, and had never paid any rent to his brother James, and that he had paid the taxes continuously since 1863. The plaintiff's evidence in rebuttal went to show that, prior to 1862, Mrs. Weatherby sold the lot to Chester Dennison by articles of agreement, and that on April 15, 1862, she began an action of ejectment against him for non-payment of the purchase-money, and on September 6th, following, she obtained a judgment by default. No proceedings had ever been taken to enforce this judgment. James Bennett also testified that on April 16, 1863, he bought the interest of Dennison in the lot, and received from him his contract with Mrs. Weatherby, and afterwards purchased, by a

written contract, the interest of Mrs. Weatherby. The court directed a verdict for the plaintiff, and judgment having been entered thereon, the defendants took this writ, assigning as error: 1. In refusing the defendants' first point, which was, that the recovery of judgment by Mrs. Weatherby in the action of ejectment brought by her against Dennison terminated the contract and all privity between them, and the possession held by Dennison thereafter was hostile and adverse to that of Mrs. Weatherby; 2. In refusing the defendants' second point, which was, that if the jury believed that Dennison transferred his possession to the defendant Joseph C. Bennett, such transfer was an assertion of his hostile and adverse possession as against Mrs. Weatherby and everybody else; 3. In charging the jury that there was no evidence to go to the jury of such adverse possession in the defendants, and those under whom they claim, as would defeat the plaintiff's right to a verdict; and 4. In directing a verdict for the plaintiff.

W. M. Lindsey, S. P. Johnson, and James O. Parmlee, for the plaintiffs in error.

Charles Dinsmoor and James Cable, for the defendant in error.

PAXSON, J. We do not think the mere fact of the recovery in the action of ejectment brought by Mrs. Weatherby against Chester Dennison rendered the possession of the latter hostile and adverse to Mrs. Weatherby. The judgment was by default; the ejectment was to enforce the article of agreement, and therefore in affirmance of it. No subsequent proceedings were ever had upon this judgment; no *habere* was issued, nor was possession delivered to the plaintiff. Such a recovery is not equivalent to an entry, even to bar the statute of limitations, and therefore not equivalent to actual possession: *Powell v. Smith*, 2 Watts, 126; *Workman v. Guthrie*, 29 Pa. St. 495; 72 Am. Dec. 654. The vendor of land sold under articles of agreement must not only in some way repudiate the agreement, but must take actual possession of the premises, either in person, by an agent, a tenant, or another vendee, in order to break the relation his vendee sustains to him under the agreement, before the statute will commence to run.

If the recovery in the ejectment were all there is in the case, the court below would have been right in withdrawing it from the jury and directing a verdict for the plaintiff. But there is the testimony of the defendant himself, who swears that he

paid Dennison fifteen dollars for the possession in 1863; that Dennison delivered up the key to him in pursuance thereof, and that he has been in adverse possession ever since; that he never paid any rent to his brother James; that he claimed to own the property, and repudiated his brother's claims as landlord; and also that he has paid the taxes thereon continuously since 1863. It is true, all this is denied by the plaintiff, and it is quite possible the jury would find the truth on her side. But the evidence amounts to more than a *scintilla*, and it was error to withdraw it from the jury.

The judgment is reversed, and a *venire facias de novo* awarded.

ADVERSE POSSESSION IS A QUESTION OF FACT TO BE DETERMINED BY JURY: *Ford v. Wilson*, 35 Miss. 490; 72 Am. Dec. 137.

VENDEE CANNOT ACQUIRE TITLE BY ADVERSE POSSESSION UNTIL HE HAS SURRENDERED POSSESSION, or repudiated the contract by some unequivocal act: *Greene v. Munson*, 9 Vt. 37; 31 Am. Dec. 605.

SCHMIDT v. MCGILL.

[120 PENNSYLVANIA STATE, 405.]

REQUEST TO CHARGE IS PROPERLY REFUSED, AS ASSUMING VERY POINT IN CONTROVERSY, where, in an action to recover damages for injuries received by a foot-passenger by being struck by a wagon at a street-crossing, the defendant asks the court to rule that if the jury believed that at the time of the accident "the defendant's driver was traveling in an ordinary manner, the defendant is not liable for an injury resulting from the use of a public street." The question was, whether the driver was traveling over the public crossing with the ordinary care requisite when passing such a point.

QUESTION WHICH PARTY WAS NEGLIGENT, IF EITHER, IS NATURAL AND MATERIAL ONE, the solution of which is for the jury, where a foot-passenger is injured by being struck by a wagon at a street-crossing, where both team and passenger had the right of way, and where both were required to use care.

PARTICULAR REFERENCE TO TESTIMONY IN CHARGE TO JURY IS UNNECESSARY, where the testimony is neither complex nor voluminous, and the attention of the jury is clearly called to the law of the case.

CASE by Mary McGill against Christian Schmidt to recover damages for injuries sustained by the plaintiff by being struck by the pole of a beer-wagon driven by a servant of the defendant, while the plaintiff was crossing Eleventh Street on Susquehanna Avenue, in the city of Philadelphia. There was evidence to show that the driver was driving rapidly, and that

the plaintiff, when crossing, did not look down Eleventh Street. The plaintiff had a verdict, and judgment being entered thereon, the defendant took this writ, assigning as error: 1. The refusal of the court to charge that "if the jury believe that at the time of the alleged accident the defendant's driver was traveling in an ordinary manner, the defendant is not liable for an injury resulting from the use of the public street"; and 2. That the charge of the court was inadequate in that it did not refer to the facts proved at the trial, and did not direct the attention of the jury to the contributory negligence of the plaintiff. The charge complained of was as follows: "This accident occurred on a public highway, where both parties had a right to be, but both parties must exercise that right in an ordinary and reasonable manner. It is impossible to define their exact duties, and the ordinary and reasonable care must depend upon the circumstances of each particular case. There is no obligation on the part of persons driving along the public streets to haul up their horses, and stop at every crossing. Nor must people look in every possible direction for vehicles approaching, and cipher out how long it will take them to arrive at the crossing. Each must exercise reasonable and ordinary care. Of course, more caution must be used at crossings than at other parts of the highway, for that is where the stones are placed to cross. The obligation is mutual. Each must use reasonable and ordinary care."

Joseph L. Tull, for the plaintiff in error.

George H. Earle, Jr., and Richard P. White, for the defendant in error.

GORDON, C. J. We have before us two assignments of error for our consideration, the first to the court's answer to one of the defendant's points, and the other to the charge. The defendant requested the court to rule that "if the jury believe that, at the time of the alleged accident, the defendant's driver was traveling in an ordinary manner, the defendant is not liable for an injury resulting from the use of the public street." This request was refused. It is also alleged that the charge of the court was inadequate, in this, that it did not refer to the facts proved at the trial, and did not properly direct the attention of the jury to the evidence tending to establish contributory negligence on part of the plaintiff below.

We are of opinion that neither of these assignments can be sustained. The first, because it assumes the very point in controversy. The question was, Was the driver of the beer-wagon traveling over the public crossing in an ordinary manner?—that is, with the ordinary care which is requisite when passing a point such as that where the accident happened. Common sense will teach any person of ordinary mental caliber that what is ordinary care must depend largely upon circumstances. Trotting a team of horses at a “fast rate for a beer-wagon” may be well enough along the open street, whilst, on the other hand, it may be gross carelessness when passing a crossing where foot-passengers are constantly to be expected, and among them many old people and children. As the learned judge before whom this case was tried well said, under such circumstances, both parties are held to ordinary care, and the careless party must suffer the consequences resulting from his own carelessness.

Here was a place where both parties must be on the lookout; the one for passing teams, and the other for foot-passengers. Both have the right of way, and both must be equally cautious. How, then, is it possible to apply the doctrine found in *Waters v. Wing*, 59 Pa. St. 211, to the contention in hand? The accident in that case did not occur at a crossing, but on the open road. The plaintiff's son, on horseback, was approaching the defendant, who was driving his buggy along the highway, which was abundantly wide for the safe passage of both, and the former ran his horse so hard against one of the shafts of the buggy as to instantly kill it. Thus, whilst the rule cited was altogether proper for the case to which it was applied, it would be altogether improper for the case in hand. Nor are the cases of *Goshorn v. Smith*, 92 Id. 435, and *Baker v. Fehr*, 97 Id. 70, more in point than the one cited, for in neither did the accident happen through the negligence of the defendant. In the one, the plaintiff, unexpectedly to the driver of the wagon by which he was injured, moved suddenly in the way of the coming team, and in such a manner that the defendant could neither anticipate nor guard against the accident. In the other, Fehr, the deceased, was struck and killed by a passing ice-wagon. He had just got off the front platform of a street-car, whilst the wagon was passing; several persons endeavored to warn him of his danger, and the driver did what he could to stop his mules, but Fehr either did not hear or did not heed the warnings, and backed or

walked directly against one of the mules, and was killed. To discover the analogy between these cases and the case under discussion is beyond our power; hence we conclude that it does not exist. Here is an accident at a public crossing, where both team and foot-passenger had the right of way, and where both were required to use care. Who, then, was negligent, if either? was the natural and material question; and the solution thereof was clearly for the jury, not for the court.

Nor can we discover any defect such as that complained of in the learned judge's charge. It is true, he does not comment specially on the evidence, and calls attention only to such of it as indicates the position of the wagon when the witnesses first saw it. But the testimony was neither complex nor voluminous; therefore, particular reference to it was unnecessary. The attention, however, of the jury was very clearly called to the law governing the case. The plaintiff must establish the fact of negligence on part of the defendant's driver; if both parties were in fault, the verdict must be for the defendant; they must be satisfied that there was negligence by the one party alone. This was surely so plain that the ordinary jurymen could not fail to understand it; or, if he did so fail, it was not the fault of the court.

The judgment is affirmed.

NEGLECTANCE IS QUESTION FOR JURY, EXCEPT WHEN THERE IS NO CONFLICT IN THE TESTIMONY: See *Selinas v. Agricultural Society*, 60 Vt. 249; *ante*, p. 114, and note; *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62; *ante*, p. 151, and note.

WOODWARD v. SHUMPP.

[120 PENNSYLVANIA STATE, 483.]

SERVANT WHO ENGAGES TO PERFORM HAZARDOUS WORK TAKES RISKS INCIDENT THERETO; but if the master by any negligent act not involved in or reasonably incident to the work causes the servant to receive a personal injury, he is responsible therefor, if the servant did not otherwise contribute to the result.

SERVANT MUST SHOW CASE CLEAR OF HIS CONCURRENT NEGLIGENCE, in an action by him to recover damages for injuries sustained through the negligence of the master; but when the measure of care which he ought to have exercised shifts with circumstances, or has been varied by the master, the jury alone can determine whether he was guilty of contributory negligence.

CASE to recover damages for personal injuries, brought by Felix Shumpp against Woodward, Graybill, & Co., Limited. The case is sufficiently stated in the opinion. The plaintiff had a verdict and judgment, and the defendants brought error.

S. Hepburn, Jr., R. M. Henderson, John Hays, and J. Webster Henderson, for the plaintiffs in error.

F. E. Beltzhoover and J. M. Weakly, for the defendant in error.

CLARK, J. It is contended by the counsel for Woodward, Graybill, & Co., Limited, that the admitted facts of this case exhibit clear contributory negligence on the part of Felix Shumpp; that the case should not have been submitted to the jury, but the court should have given specific and binding instructions to find for the defendants. The first and second points submitted by the defendants' counsel were doubtless intended to raise this question in the court below, and as they were refused, we will consider the case as if the points were in this precise form. A brief reference to the facts is necessary to a complete understanding of the case. In the recital of the circumstances under which the jury was received, we of course assume the proof of the plaintiff's testimony, as it is upon this theory of the case the defendants contend the plaintiff cannot recover.

Woodward, Graybill, & Co. were, in the year 1883, engaged in the coal, grain, and forwarding business in Carlisle. John G. Bobb was a member, and Felix Shumpp an employee, of the company. On the 24th of August of that year, Bobb called upon Shumpp to assist him in shifting a car from the side-track to the main track of the Cumberland Valley Railroad Company, for some purpose connected with the business of the defendants. Shumpp, by Bobb's direction, hitched a horse to the west end of the car, and hauled it up the grade to a point above the switch, where the brake was applied. The horse was then unhitched and driven to the east end of the car to pull it back on the main track. Whilst the horse was between the rails, and before Shumpp could attach the chain to the bull-nose of the car, Bobb loosened the brake, and the car, impelled by its own gravity, started slowly down the grade; Shumpp, holding the line in his left hand, attempted to attach the chain to the car with the right; the horse was a spirited animal, and he did not succeed. He called repeatedly to Bobb to stop the car, but the brake was not applied, and after advancing fifty feet or more in the effort to hitch the

horse, his left foot became fastened between the guard-rail and the north rail of the track; the car came upon him, and cut and crushed his left leg so that amputation became necessary.

It is undoubtedly true, as a general proposition, that one who places himself on the track in front of a moving railroad car assumes a place of known danger, and will ordinarily be supposed to accept the peril and risk to which he thus recklessly subjects himself. It is equally true, where he engages to perform a hazardous work, he takes the risks incident thereto: *Rummell v. Dilworth*, 111 Pa. St. 343; *Philadelphia and Reading R. R. Co. v. Hughes*, 119 Id. 301; but if the master, by any negligent act not involved in or reasonably incident to that work, causes his servant to receive a personal injury, he is responsible therefor, if the servant did not otherwise contribute to the result. When Shumpp placed himself in front of this car, he did so by the direction of Bobb, his employer, and had no reason to suppose that the brake would be lifted until he had completed the connection with the car. Before this could be done, however, the car was set in motion, and he was obliged to regulate the movements of his horse, observe the approach of the car, watch his opportunity to connect the hook with the car, and have regard for his own safety, all at one and the same time. He had committed himself and the horse to the space in front of the car on the track whilst the brakes were on and the car standing still; and it was the negligent act of Bobb which put the car in motion before Shumpp was prepared for it. There were piles of railroad iron and other obstructions at the side of the track which prevented him from leaving it, and as the car advanced towards him, he was obliged to keep out of its way under all the embarrassments stated.

If these facts are true, can it be pretended that the court would have been justified in saying, as matter of law, that Shumpp was guilty of negligence? The rate of speed at which the car was moving, the nature and extent of the obstructions at the side of the track, the spirit and conduct of the horse, and the manner in which the plaintiff conducted himself throughout the transaction, were all matters to be considered in arriving at a conclusion on the question of contributory negligence. The plaintiff, as we said in *Lee v. Woolsey*, 109 Pa. St. 124, must in all cases "show a case clear of his concurrent negligence,—a case resulting exclusively from the negligence and wrong of the defendant; but when the mea-

ure of care which he ought to have exercised shifts with the circumstances, or when the care which ought to be exacted from an employee has been varied by his employer, the jury alone can determine whether he negligently performed his duty."

We are of opinion that the case was one for the determination of the jury, and that it was fairly submitted.

The judgment is affirmed.

SERVANT ASSUMES ALL ORDINARY RISKS INCIDENT TO EMPLOYMENT: See *Wootilla v. Duluth L. Co.*, 37 Minn. 153; 5 Am. St. Rep. 832; *Wilson v. Winona etc. R. R. Co.*, 37 Minn. 326; 5 Am. St. Rep. 851. As to those risks which are not naturally incident to the employment, and which the servant is not bound in the exercise of ordinary care and prudence to know, the master is bound to inform and warn the servant, and is liable for neglect of that duty: *O'Donnell v. A. V. R. R. Co.*, 59 Pa. St. 239; 98 Am. Dec. 336; *Wootilla v. Duluth L. Co.*, 37 Minn. 153; 5 Am. St. Rep. 832.

SERVANT MUST PROVE BY LEGAL EVIDENCE THAT HE WAS EXERCISING DUE CARE at time of injury, to entitle him to recover: *Wormell v. Maine C. R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321.

CONTRIBUTORY NEGLIGENCE IS QUESTION FOR JURY, except where there is no conflict in the testimony, and the inferences to be drawn from it are clear and simple: *Selinas v. Agricultural Soc.*, 60 Vt. 249; *ante*, p. 114, and note; *Schmidt v. McGill*, 120 Pa. St. 405; *ante*, p. 713.

WILLIAMS v. HAY.

[120 PENNSYLVANIA STATE, 485.]

SERVITUDE OF SUFFICIENT SURFACE SUPPORT EXISTS IN UNDER OR MINERAL ESTATE in favor of the upper or superincumbent estate, where one person owns the surface and another person owns the underlying coal or other minerals, unless the parties have otherwise covenanted.

ABSOLUTE RIGHT OF UPPER ESTATE TO SURFACE SUPPORT IN UNDER OR MINERAL ESTATE IS NOT TO BE TAKEN AWAY by mere implication from language in a deed which does not necessarily import such a result; and therefore the right of support is not taken away by a clause in a deed conveying the surface, but reserving the underlying coal and other minerals, which provides that the grantor, "in mining and removing the coals, iron ore, and minerals aforesaid, shall do as little damage to the surface as possible."

CASE IS PROPER FORM OF ACTION TO RECOVER FOR DAMAGES TO SURFACE OF LAND caused by removing the support thereof by operating the underlying mines; or, at all events, an objection that the action should have been trespass is of no avail after a trial upon the merits, especially where the defendant suffered no injury thereby.

AMENDMENT IS PROPERLY MADE IN STRIKING WIFE'S NAME FROM RECORD after verdict in an action on the case against a husband and wife, leaving the judgment to stand against the husband alone.

PRIOR VERDICT AND JUDGMENT IN ANOTHER ACTION FOR INJURIES TO PROPERTY CANNOT BE SET UP AS BAR when the pleadings disclose the fact that the two causes of action are for injuries to different portions of the property.

CASE by J. M. Hay against Charlotte Williams and Thomas Williams, her husband, to recover damages for injuries alleged to have been sustained by the plaintiff to the surface of two tracts of lands by reason of the negligent and unskillful mining of the underlying coal by the defendant Charlotte Williams. The defendants pleaded not guilty, and also a former recovery by the plaintiff in action No. 47, August term, 1883. The plaintiff replied to the second plea, that the recovery was for injuries on other portions of the plaintiff's land done by one John Williams, impleaded with the defendants in that cause. At the trial, the plaintiff showed title to the surface of one of the tracts, containing 241 acres, by deed from W. J. Baer, which reserved to Baer, his heirs and assigns, the right of searching for, mining, procuring, and taking away the underlying coal and other minerals, "provided, however, that the said W. J. Baer, his heirs and assigns, in mining and removing the coals, iron ore, and minerals aforesaid, shall do as little damage to the surface as possible"; and title to the surface of the other tract, containing 42.42 acres, by deed from the Salisbury and Baltimore Railroad and Coal Company, which reserved to the company "all the coal, iron ore, fire-clay, and all the other minerals and mineral substances, both liquid and solid, under the surface of said land, except the limestone, which are hereby conveyed with the surface soil to the said party of the second part." The plaintiff then gave in evidence a subsequent mining lease of the forty-two-acre tract from the company to Thomas Williams, in trust for Charlotte Williams, his wife, and John Williams, his son; and gave evidence as to the injury caused to the surface of each tract by the mining operations beneath. It appeared that Thomas Williams was the superintendent and manager, under whose direction the mining was done. The defendants simply offered in evidence the record of the former suit by Hay against John Williams, Thomas Williams, and Charlotte Williams, his wife, wherein it appeared that a recovery was had for injuries to a portion of the forty-two-acre tract. The jury returned a verdict for the plaintiff. A motion for a new trial was made by the defendants, and pending the motion, the plaintiff moved to amend the record by striking the name

of Charlotte Williams therefrom. The court overruled the motion for a new trial, and made the rule to amend absolute, permitting the plaintiff to take judgment as though the amendment had been made and allowed before verdict. Judgment having been entered on the verdict, the defendant Thomas Williams took this writ, assigning as error: 1. The answer to the plaintiff's points, as follows: (1) That if the jury find that the plaintiff is the owner of the surface, and that the defendants mined, took, and carried away the underlying coal, and that by reason of their mining and removing the coal the surface caved in, they are responsible for all damages caused thereby to the owner of the surface, without regard to the manner of mining, whether skillfully or negligently done; and (2) That if the jury find that the surface of a portion of the plaintiff's land sunk and caved in by reason of the removal of the coal from beneath it by the defendants, by not leaving sufficient actual support, or not putting up sufficient posts and supports, the plaintiff was entitled to recover such damages as he had sustained thereby. To which the court answered, that where one granted the surface of land and reserved the coal and other minerals, an implied right of support to the surface passed to the grantee; and neither the the grantor nor his lessee might mine or remove the coal or other minerals without leaving actual, absolute support to the surface, unless by some apt words in the deed the implied right to support was excepted from the grant; but in this case there was no such exception in the deed, and the right to surface support passed to the plaintiff. In this case, the surface belonged to the plaintiff, and the coal belonged to the defendants, or those under whom they are mining. The defendants might take the coal if they could do so without causing a subsidence of the surface; but they must support the surface by actual, absolute support by leaving a sufficiency of ribs and pillars to hold it up, or by the coal itself; and if they take it all out, they must provide actual and absolute support in some other way. The failure to sufficiently support the surface was negligence, and rendered the owners and workers of the mine liable for damages to the extent of the injuries sustained by the owner of the surface. The owner of a mine has the right to mine his coal in an ordinary manner, so long as he does no injury more than the injury which necessarily arises from the mere removal of the coal, independent of the caving in of the surface; but in this case the skill-

fulness of the mining was not involved. The case turns upon the question whether the surface was sufficiently supported by actual support; and if the jury find that the surface has not been kept up by actual and sufficient support, then damages follow; 2. In refusing the first point of the defendants, which was, that this being an action on the case against Charlotte Williams, a married woman, under the pleadings and the evidence the verdict must be for the defendants; 3. In refusing the defendants' second point, which was, that the plaintiff having previously brought suit against the defendants for damages done to a portion of the tract conveyed by the Salisbury and Baltimore Railroad and Coal Company, and recovered damages therein for removing coal under a portion of that tract, and an inspection of the declaration in that case and the declaration in this action disclosing the fact that it cannot be ascertained whether the damages now claimed are for the same injury received in the former suit, the verdict must be for the defendants; 4. In refusing the defendants' third point, which was, that there being no evidence that any coal was mined under the plaintiff's land since the commencement of the previous action, the verdict must be for the defendants; 5. In refusing the defendants' fourth point, which was, that under the pleadings and the evidence in the case, the verdict must be for the defendants; 6. In refusing the defendants' fifth point, which was, that since the defendants had no right to enter upon the 241-acre tract, if they did enter upon that tract and mine coal, whereby the surface was let down as alleged, they were trespassers, and cannot be held for any damage done to that tract in this action on the case; 7. In allowing the plaintiff's motion to amend the record, as above, by striking out the name of Charlotte Williams; 8. In charging the jury that the damage resulted from the taking away of coal which the defendants had a right to take away.

H. S. Endsley, W. H. Koontz, and W. H. Ruppel, for the plaintiff in error.

Valentine Hay, for the defendant in error.

PAXSON, J. It is settled law in this state that where one person owns the surface, and another person owns the coal or other minerals lying underneath, the under or mineral estate owes a servitude of sufficient support to the upper or superincumbent estate. This principle has no application where the

same person is the owner of both estates, nor does it apply where, by the contract between the parties, they have covenanted for a different rule. Like any other right, the owner of the surface may part with the right to support, by his deed or covenant: *Jones v. Wagner*, 66 Pa. St. 429; 5 Am. Rep. 385; *Horner v. Watson*, 79 Pa. St. 242; 21 Am. Rep. 55; *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93; *Scranton v. Phillips*, 94 Pa. St. 15; *Carlin v. Chappel*, 101 Id. 348; 47 Am. Rep. 722.

The defendant below contended that as to the tract of 241 acres the right to surface support was waived by the terms of the deed from W. J. Baer conveying the surface, and reserving the right to the underlying coal. The words of the deed relied upon are as follows: "Provided, however, that the said W. J. Baer, his heirs and assigns, in mining and removing the coals, iron ore, and minerals aforesaid, shall do as little damage to the surface as possible."

It was urged that this language implies that some damage would necessarily ensue to the surface in mining the coal. But an absolute right to surface support is not to be taken away by a mere implication from language which does not necessarily import such a result. The owner of the coal had certain surface rights which were indispensable to the carrying on of his mining operations, such as the right to go upon the surface to make explorations for the minerals beneath, and bore holes, sink shafts, drifts, etc., and the right to make roads and erect structures for taking out the coal. Hence it is a fair construction of the deed to say that in doing these things as little damage was to be done to the surface as possible. The provision referred to covers these matters, and as we have a subject to which it directly applies, it would be a strained interpretation of the deed to hold that it was intended to take away the right of surface support.

We are unable to see any force in the suggestion that the action should have been trespass instead of case. A technical objection of this nature comes with little force after a trial upon the merits, especially in cases where the party making it has received no injury thereby. Aside from this, the injury charged in the *narr.* was of a purely consequential nature, being the subsidence of the surface, the result of not leaving sufficient props to support it.

The objection that the action would not lie against Mrs. Williams because she was a married woman need not be dis-

cussed, for the reason that the court below allowed an amendment by which her name was stricken from the record, and the judgment allowed to stand against her husband alone. This amendment was properly allowed.

We are unable to see how the recovery in the first suit, No. 47, August term, 1883, can be set up as a bar to this action. An examination of the *narr.* in each case does not show them to be for the same cause of action. On the contrary, they refer to different portions of the property.

The remaining assignments do not require discussion.

Judgment affirmed.

OWNER OF RIGHT TO MINE IN LANDS OF ANOTHER IS BOUND TO LEAVE SUFFICIENT SUPPORT for the superincumbent soil in its natural state, and is liable in damages for injury by subsidence: *Jones v. Wagner*, 66 Pa. St. 429; 5 Am. Rep. 385; *Marvin v. Brewster I. Mfg. Co.*, 55 N. Y. 538; 14 Am. Rep. 322; *Ryckman v. Gillis*, 57 N. Y. 68; 15 Am. Rep. 464, and note 470; *Horner v. Watson*, 79 Pa. St. 242; 21 Am. Rep. 55; *Coleman v. Chadwick*, 80 Pa. St. 81; 21 Am. Rep. 93; *Livingston v. Moingona Coal Co.*, 49 Iowa, 369; 31 Am. Rep. 150; *Yandes v. Wright*, 66 Ind. 316; 32 Am. Rep. 109; *Wilms v. Jess*, 94 Ill. 464; 34 Am. Rep. 242; *Carlin v. Chappel*, 101 Pa. St. 348; 47 Am. Rep. 722.

JUDGMENT OPERATES AS RES ADJUDICATA ONLY WHEN THE CAUSES OF ACTION ARE IDENTICAL, and will be supported by the same evidence: Note to *Lea v. Lea*, 96 Am. Dec. 772 et seq.; *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436, and note.

IN RE KENNEDY.

[120 PENNSYLVANIA STATE, 497.]

ATTORNEY MAY BE SUMMARILY COMPELLED BY COURT TO PAY OVER MONEY COLLECTED BY HIM only when the relation of attorney and client in the transaction exists between him and the petitioner; and if, on the application for such a rule, an issue of fact is raised as to whether the relation exists, the attorney is entitled to a trial by jury.

ATTORNEY WILL NOT BE SUMMARILY COMPELLED BY COURT TO PAY OVER MONEY COLLECTED BY HIM, when his answer to the rule convinces the court that the money was withheld in good faith, and believed to be no more than an honest compensation, but the petitioner will be remitted to his action at law.

RULE on Robert P. Kennedy, an attorney at law, to show cause why he should not pay over to Abner L. Lynn sixty dollars, collected by Kennedy on a judgment. The rule was made absolute, and Kennedy took this writ, assigning the order as error.

Edward Campbell, for the plaintiff in error.

G. W. K. Minor, for the defendant in error.

PAXSON, J. This is a very small case, — so small that it would have been better for all parties concerned had they kept it out of this court. The amount in controversy is but ten dollars, being a sum retained by the respondent as a fee for collecting a sum of money under the following circumstances: —

The respondent had entered his appearance as attorney for the plaintiff in a judgment, *Walker v. Huntley*, No. 191, September term, 1882, in the common pleas of Fayette County. The interest on this judgment — sixty dollars per annum — was paid to him for about four years, and all of it, except the last payment of sixty dollars, was paid over to the party entitled thereto. From the last sum, he claimed to deduct the sum of ten dollars as a fee, and tendered the petitioner the balance thereof, — fifty dollars. This the latter declined to receive, and presented his petition to the court below, alleging the refusal to pay, and averring that respondent was never employed by him as an attorney, and had no authority to collect the interest money in question. The respondent answered the petition, alleging that he was employed as counsel, and had the right to receive the money in that capacity. The court below made an order requiring the respondent to pay over the money.

If the allegation of the petitioner is true that there was no relation of attorney and client between them, it is very plain that the petitioner is out of court. It is only by virtue of such relation that the court has any jurisdiction to interfere in a summary manner. The court might as well make an order upon an attorney to pay his tradesmen's bills.

In *Balsbaugh v. Frazer*, 19 Pa. St. 95, the rule was thus laid down in respect to the right of an attorney to retain his fees out of money in his hands: "If the client is dissatisfied with the sum retained, he may either bring suit against the attorney or take a rule upon him. In the latter case, the court will compel immediate justice or inflict summary punishment upon the attorney, if the sum be such as to show a fraudulent intent. But if the answer to the rule convinces the court that it was held back in good faith, and believed not to be more than an honest compensation, the rule will be dismissed, and the client remitted to a jury trial." And we may add to this,

that a man does not lose his right to trial by jury because he is an attorney at law. Where an issue of fact is fairly raised between himself and his client, he is as much entitled to such trial as any other citizen.

In the case in hand, the only disputed fact was, whether the respondent was of counsel for the petitioner. The latter, as before stated, denied the existence of any such relation. The court below decided this question of fact against the respondent, ordered the money to be paid over by him, and that his name be stricken from the record of the judgment.

In any view of the case, the order must be reversed. If we concede the right of the court to find the disputed fact of the professional relation, the facts, as found, put the petitioner out of court. On the other hand, if the relation of attorney and client existed, the fee charged was so moderate that no reasonable man would think of disputing it. That some relation of attorney and client existed between these parties appears from the statement of the petitioner. And there is some implication of such a relation in the fact that the respondent had collected the interest on this judgment for some years, and paid it over to the petitioner.

The order is reversed, at the costs of the petitioner below.

POWER OF COURTS TO EXERCISE SUMMARY JURISDICTION OVER ATTORNEYS: See extended note to *Burns v. Allen*, 2 Am. St. Rep. 847 et seq.

NIAGARA FIRE INSURANCE COMPANY v. MILLER.

[120 PENNSYLVANIA STATE, 504.]

ASSURED WAS NOT BOUND TO REPORT TO COMPANY FACT THAT PERSONAL PROPERTY INSURED WAS UNDER LEVY OF EXECUTION at the time the application was made and the insurance effected, under a policy which contained a warranty that "the assured, by the acceptance of this policy, hereby warrants that any application, survey, plan, statement, or description connected with procuring this insurance, or contained in or referred to in this policy, is true, and shall be a part of this policy; that the assured has not overvalued the property herein described, nor omitted to state to this company information material to the risk," where there was no fraud on the part of the assured, the sheriff never took the goods out of his possession, the policy contained no clause that the insurance should cease if the property should be levied upon or taken in execution, and there was nothing in the policy to warn the assured that the company regarded a levy as an increase of the risk.

COURT MAY PROPERLY INSTRUCT JURY THAT INSURANCE COMPANY COULD WAIVE RIGHT TO AVOID POLICY on the ground of an erroneous state-

ment by the assured of the amount of judgments against him, and may submit the fact of waiver to the jury, where the policy contained a warranty against untrue statements, but not a distinct warranty against encumbrances, and where, after the loss, the company, with full knowledge of the encumbrances, called for proofs of loss, required the assured to furnish full plans and specifications of the building destroyed, joined in the appointment of appraisers, and for nearly a year did not inform the assured of the objections to payment, but led him to believe that more formal proofs of loss and specifications were desired.

ASSUMPSIT by Frank Miller against the Niagara Fire Insurance Company of New York, on a policy of fire insurance. There was a verdict and judgment for the plaintiff, and the defendant brought error. The opinion states the case.

Morton P. Henry, John Cessna, and J. H. Longenecker, for the plaintiff in error.

John M. Reynolds and John H. Jordan, for the defendant in error.

PAXSON, J. This was an action of *assumpsit* upon a policy of insurance. The policy contained the following warranty:—

“The assured by the acceptance of this policy hereby warrants that any application, survey, plan, statement, or description connected with procuring this insurance, or contained in or referred to in this policy, is true, and shall be a part of this policy; that the assured has not overvalued the property herein described, nor omitted to state to this company information material to the risk. And this company shall not be bound under this policy by any act or statement made to us by any agent or other person which is not contained in this policy, or in any written paper above mentioned.”

There is nothing in the record to indicate that the claim was not for an honest loss. The company defended upon two grounds: (a) that at the time of the application for the insurance the personal property insured was under levy and execution on a judgment against the plaintiff, which he failed to disclose to the company's agent at the time the insurance was effected; and (b) that the plaintiff stated that there were judgments against him to the amount of five hundred dollars, when in fact judgments existed to the extent of fifteen hundred dollars, which were a lien on the insured real estate. These objections were based upon the allegation that the facts referred to increased the risk, and had they been disclosed to the company a larger premium would have been demanded.

It will be noticed that the warranty is not in terms a warranty against encumbrances, nor did the policy contain a clause that the insurance should cease in case the property in question should be levied upon or taken in execution. The fact was, that the goods insured were not taken out of the possession of the plaintiff by the sheriff. Was the insured bound to communicate the fact of the execution to the company? If it increased the risk, and the plaintiff knew that it increased it, we think it was his duty, under the clause of the policy which we have referred to, to have notified the company, and upon his failure to do so, he would not be entitled to recover. But what was there in the mere fact of the paper levy to inform the insured that the risk was thereby increased? The goods still remained in his possession, and unless he contemplated some fraud, which we are not to presume, or unless there was something in the policy to warn him that the company regarded a levy as an increase of risk, how can we say that he was bound to know that it was increased? We have held in *Lebanon Mutual Ins. Co. v. Loesch*, 109 Pa. St. 100, and in *Rife v. Lebanon Mutual Ins. Co.*, 115 Id. 530, that unless the assured has knowledge that a particular fact will increase the risk, he is not bound to report such fact to the company. Were we to sustain a contrary doctrine, it would make a clause like the one referred to in this policy a mere device to delude ignorant people. It is not to be presumed that the average man or woman who seeks to protect his or her property by insurance is an expert in the science of insurance, especially upon that branch of it which refers to the increase of risk. It is a very simple matter for the company to inform the assured, by the terms of its policy or otherwise, what it regards as an increase of risk.

The only remaining point is the matter of the encumbrances. There was not, as I have before observed, a distinct warranty against encumbrances. The warranty was against untrue statements in the application. It is not denied that the encumbrances exceeded the amount there stated by the insured. Whether it was by accident, ignorance, or design does not appear. The court below charged the jury, and this is the main contention here, that this avoided the policy at the election of the company, but that the latter could waive the right to avoid it, and submitted the question of waiver to the jury, who found against the company.

I do not think that the mere fact of the company's calling

upon the assured to furnish the preliminary proofs of loss as required by the policy would of itself be a waiver of the company's right to avoid the policy. Cases might arise where such proofs might be necessary to enable the company to show the breach of warranty. There must be an intention to waive a forfeiture by notice or acts inconsistent with acts exercising the right to forfeit: *Diehl v. Adams County Mut. Ins. Co.*, 58 Pa. St. 443; 98 Am. Dec. 302; *Buckley v. Garrett*, 47 Pa. St. 204. The case was not submitted to the jury upon the narrow ground that the mere fact of calling for proofs of loss was such a waiver. There was a great deal more in the case than this. There was testimony that Mr. Moore, the agent of the company who placed the risk, was told by the assured that there were five hundred dollars or six hundred dollars of judgments, and there might be more, and that he, the agent, should see the prothonotary about it; that the company, before the proofs of loss, and with full knowledge of the encumbrances, not only called for proofs of loss, but required the assured to furnish full plans and specifications of the building destroyed, which were made out by the assured's architect and forwarded; that it also joined in the appointment of appraisers; "that up to this time, although nearly a year had transpired, and though the time limited by the policy within which to bring suit was one year from the date of the fire, no objection was stated or made that in the least informed the plaintiff on what grounds, if any, the defendant objected to payment; that he was led on by letters suggesting more formal proofs of loss and specifications from time to time; and when letters were received, he was not informed of any defect, though he asked to be informed what, if any, objections there were." It is difficult to see how the learned court below could have avoided the submission of such matters as these to the jury. If believed by them, they fairly amounted to an estoppel. The company was bound to good faith to the assured, and if, with the knowledge in its possession of every fact upon which to avoid the policy, they misled the plaintiff for nearly a year, subjected him to the expense of procuring plans and specifications of his building, and never informed him that they would not pay because the policy was avoided, they have no ground to complain if they are now held to be estopped from setting up such a defense.

I find nothing to conflict with these views in any of our decided cases. On the contrary, I find much to sustain them. The case in hand, however, stands to some extent upon its

own facts, and for this reason I have considered a discussion of the cases cited unnecessary.

Judgment affirmed.

OMISSION TO MENTION LIEN, PROPERTY REMAINING IN POSSESSION OF INSURED, is not breach of covenant requiring full statement of ownership: *Carrigan v. Lycoming Ins. Co.*, 53 Vt. 418; 38 Am. Rep. 687.

INSURANCE COMPANY MAY WAIVE RIGHT TO AVOID POLICY by failing to object, and entering into negotiations for settlement of loss: *Oakleaf etc. Co. v. Germania F. Ins. Co.*, 71 Wis. 454; 5 Am. St. Rep. 233, and note.

DELAWARE, LACKAWANNA, AND WESTERN RAILROAD COMPANY v. CADOW.

[120 PENNSYLVANIA STATE, 538.]

PARTY CANNOT RECOVER DAMAGES FOR NEGLIGENT INJURY which, by the exercise of reasonable care, he might have avoided.

NEGLIGENCE IS ORDINARILY QUESTION FOR JURY, but when the facts are uncontroverted, their legal effect is for the court.

VERDICT SHOULD BE DIRECTED FOR DEFENDANT IN ACTION FOR PERSONAL INJURIES CAUSED BY DEFENDANT'S NEGLIGENCE, where the uncontroverted facts show that the plaintiff, a cripple with a stiff leg, left a safe path, which he had often traveled, along the sidewalk of a street, to go hastily, in the night-time and without a light, diagonally across a plank railroad crossing, the condition of which he did not know, and got off the crossing, stumbled among the rails, fell, and was injured.

CASE by Albert E. Cadow against the Delaware, Lackawanna, and Western Railroad Company to recover damages for injuries received while attempting to pass over a plank crossing of the defendant in a street. There was a verdict and judgment for the plaintiff, and the defendant brought error. The facts are stated in the opinion. The defendant's eleventh point referred to was, "that, under all the evidence, the verdict should be for the defendant."

George E. Elwell and John G. Freeze, for the plaintiff in error.

William Chrisman, E. R. Ikeler, and Grant Herring, for the defendant in error.

WILLIAMS, J. The learned judge of the court below affirmed the defendant's tenth point, while refusing the eleventh. The instruction asked by the tenth point was as follows: "If the court should be of the opinion that a pedestrian has the right to cross the highway at any point, then we respectfully ask the

court to charge the jury that if in so doing in the night-time, a cripple with a stiff leg departs from a path which he knows is safe, and ventures hastily upon one whose condition he does not know, in order to reach the same point on the opposite side of the street, he is guilty of negligence, and cannot recover damages for injuries received by falling over an obstruction which he knew lay in his path."

The facts embodied in this point appear in the testimony of the plaintiff. He was a cripple with a stiff leg, the result of an earlier fracture. He had a safe path, which he had often traveled, along the sidewalk to the opposite side of the railroad, and thence to his work. He left this path to go hastily upon a route leading across the road and railroad in a diagonal line, and over a plank crossing, the condition of which he says he did not know. It was in the night-time, and he was without a light. In hastily crossing the railroad, which he knew to be in his path, he got off the crossing at the east end of the planking, stumbled among the rails, fell, and was injured. There was no controversy over any one of the facts grouped together in this point, and the answer affirming it left nothing for the jury.

It may be that the crossing did not extend, as it should have done, over all of the roadway available for passage, and that the company was guilty of negligence in leaving it in the condition in which it was at the time of the accident; but this point asked and the court gave an instruction that the facts stated showed the plaintiff to be guilty of negligence, and that he could not recover for that reason. A party cannot recover damages for an injury which, by the exercise of reasonable care, he might have avoided: *Beatty v. Gilmore*, 16 Pa. St. 463; 55 Am. Dec. 514; *Pittsburgh Southern R. R. Co. v. Taylor*, 104 Pa. St. 306; 49 Am. Rep. 580. Negligence is ordinarily a question for the jury, but where the facts are uncontroverted, their legal effect is for the court: *Catawissa R. R. Co. v. Armstrong*, 52 Pa. St. 282; *Pittsburgh and Connellsville R. R. Co. v. McClurg*, 56 Id. 294; *McKee v. Bidwell*, 74 Id. 218; *City of Erie v. Magill*, 101 Id. 616. All the facts affecting the question of contributory negligence were furnished by the plaintiff's testimony. What was their legal effect? This was the question presented by the tenth point, and, as we think, properly answered. If so, there was no question left which, if submitted to the jury, could relieve the plaintiff from the consequences of his own carelessness, and the bind-

ing instruction asked for in the eleventh point should have been given.

Judgment reversed.

NEGLIGENCE IS QUESTION FOR JURY, EXCEPT WHERE THERE IS NO CONFLICT in the testimony, and the inferences to be drawn from it are clear and simple: *Schmidt v. McGill*, 120 Pa. St. 405; *ante*, p. 713, and note; *Woodward v. Shumpp*, 120 Pa. St. 458; *ante*, p. 716.

CONTRIBUTORY NEGLIGENCE WHICH IS PROXIMATE CAUSE OF INJURY will bar recovery: *Hurt v. St. Louis etc. R'y Co.*, 94 Mo. 255; 4 Am. St. Rep. 374, and note.

ROMMEL v. SCHAMBACHER.

[120 PENNSYLVANIA STATE, 572.]

PROPRIETOR OF SALOON OR TAVERN, OPEN FOR ENTERTAINMENT OF PUBLIC, IS BOUND TO SEE THAT ONE WHO ENTERS IS PROTECTED, not only from the assaults or insults of those in his employ, but of the drunken and vicious men whom he may choose to harbor.

PROPRIETOR OF SALOON IS LIABLE FOR INJURIES SUSTAINED BY ONE WHO ENTERS THEREIN and becomes intoxicated, by reason of another, who also became intoxicated there, and who, in full view of the proprietor, attached a piece of paper to the former and set it on fire.

CASE by William Rommel, aged twenty, against Jacob Schambacher, to recover damages for injuries sustained by the plaintiff while in the defendant's saloon, by reason of one Edward Flanagan, an occupant of the saloon, who attached a piece of paper to the plaintiff and set it on fire. The declaration charged a liability of the defendant, as a tavern-keeper, to the plaintiff, as his guest, and also charged a liability under section 8 of the act of May 8, 1854, Pamphlet Laws, 663, "To protect certain domestic and private rights, and prevent abuses in the sale and use of intoxicating drinks," which provided that "any person furnishing intoxicating drinks to any other person in violation of any existing law, or of the provisions of this act, shall be held civilly responsible for any injury to person or property in consequence of such furnishing, and any one aggrieved may recover full damages against such person so furnishing by action on the case, instituted in any court having jurisdiction of such form of action in this commonwealth." The plaintiff was nonsuited, and he now brings error.

Henry D. Wireman, for the plaintiff in error.

Charles H. Downing, for the defendant in error.

GORDON, C. J. From the evidence in this case, we gather the following facts: On the evening of the 9th of August, 1884, the plaintiff, William Rommel, a minor, entered the tavern of the defendant, Jacob Schambacher, and there found one Edward Flanagan; they both became intoxicated on liquor furnished them by Schambacher. Whilst the plaintiff was standing on the outside of the bar, engaged in conversation with the defendant, who was on the inside thereof, Flanagan pinned a piece of paper to Rommel's back and set it on fire. The consequence was that Rommel's clothes were soon in flames, and before they could be extinguished he was very badly injured. He brought the present suit to recover damages from the defendant for the injury thus sustained. The court below adjudged the facts as stated above to be insufficient to sustain the plaintiff's case, and directed a nonsuit. In this we think it made a mistake.

There is no doubt that the defendant, from the position he occupied, had a full view of the room outside of the bar, and did see, or might have seen, all that was going on in it. If, in fact, he did see Flanagan setting fire to the plaintiff, and did not interfere to protect his guest from so flagrant an outrage, his responsibility for the consequences is undoubted. If, on the other hand, he was guilty of making Flanagan drunk, or if he came there drunk, and Schambacher knew that fact, he was bound to see that he did no injury to his customers. All this a plain matter of common law and good sense, and does not depend on the act of 1854, or any other statute. Where one enters a saloon or tavern, opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from the assaults or insults, as well of those who are in his employ as of the drunken and vicious men whom he may choose to harbor.

To illustrate the principle here stated we need go no further than the case of *Pittsburgh etc. R. R. Co. v. Pillow*, 76 Pa. St. 510; 18 Am. Rep. 424. In the case cited, a drunken row occurred on board one of the defendant's cars, and during the quarrel a bottle was broken, and a piece of the glass struck the plaintiff, a peaceable passenger, in the eye, and put it out; held, that the company was responsible for the injury thus done. In the opinion of this court the following language was used: "The plaintiff lost his eye through the quarrel of a couple of drunken men, who should not have been permitted aboard the cars, or, if so permitted, should have been so

guarded or separated from the sober and orderly part of the passengers that no injury could have resulted from their brawls." If, then, a railroad company is liable for the conduct of drunken men who may chance to board its cars, much more the tavern-keeper who not only permits drunken men about his premises, but furnishes liquor to make them drunk, and who is thus instrumental in fitting them for the accomplishment of just such an insane and brutal trick as that disclosed by the evidence of the case in hand.

The judgment of the court below is now reversed, and a new *venire* ordered.

LIABILITY OF ONE ENGAGED IN PUBLIC EMPLOYMENT FOR PERSONAL INJURIES SUSTAINED BY CUSTOMER FROM THIRD PERSON.—The liability of a master, whether engaged in a public occupation like that of an innkeeper or common carrier of passengers, or not, for injuries sustained through the torts of his servants is well settled: See *Ware v. Barataria etc. Canal Co.*, 35 Am. Dec. 189, and note. But the question is entirely different where one is sought to be held responsible for a tortious act committed by another not in his employment. If there is any such liability, it must be because there is some duty resting upon the person sought to be charged towards the injured person. The principal case maintains the existence of such a duty in a saloon or tavern keeper towards his customers; and in doing so, it extends a doctrine that has been applied several times to common carriers of passengers. Thus in an action against a company engaged in the transportation of persons, by a passenger who was injured by the discharge of a musket dropped on the deck of the company's steamer by one soldier engaged in a struggle with another soldier, Shipman, J., in charging the jury, said: "The defendants were bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence from whatever source arising, which might reasonably be anticipated or naturally be expected to occur, in view of all the circumstances, and of the number and character of the persons on board": *Flint v. Norwich etc. Transp. Co.*, 6 Blatchf. 158; 34 Conn. 554; affirmed in 13 Wall. 3. This is generally regarded as a correct statement of the law: See Cooley on Torts, 645; Schouler's Bailments and Common Carriers, sec. 643; Thompson's Carriers of Passengers, 306; compare 2 Shearman and Redfield on Negligence, sec. 512; and see *Goddard v. Grand Trunk R'y*, 57 Me. 202, 213, 2 Am. Rep. 39, 41, per Walton, J., adopted in *Sherley v. Billings*, 8 Bush, 147, 152, *Chicago etc. R. R. v. Fleaman*, 103 Ill. 546, 550, *Stewart v. Brooklyn etc. R. R.*, 90 N. Y. 588, 591, 43 Am. Rep. 185, 186. The court further held that the company was not excused from liability by the fact that it was compelled by the government to receive the soldiers on board, and that they were in charge of officers; certainly not after it had voluntarily received the plaintiff as a passenger, without notice to him of the enforced presence of the soldiers. In the recent case of *Chicago etc. R. R. v. Pillsbury*, 123 Ill. 9, 5 Am. St. Rep. 483, it was said that so far as the machinery and cars, the fitness of the road-bed, and the competency and faithfulness of the servants employed were concerned, a carrier of passengers by railway is obliged to use the highest reasonable and practical skill, care, and diligence; but as to the dangers and perils not

incident to the ordinary mode of travel, the liability is less stringent. The carrier must omit no care to discover and prevent injuries to passengers from dangers not incident to the ordinary mode of travel that is reasonable and practicable. The degree of care to be observed must depend in a large measure upon the attendant circumstances. In many cases, if the carrier observed ordinary care and diligence to discover and prevent injuries to passengers from such causes, it would be exonerated from liability; while in other cases, and under other circumstances, it would be the duty of the carrier to exercise the utmost care, skill, and diligence to protect the passengers from such injuries, so far as the same, by the exercise of such care, skill, and diligence, could have been reasonably and practicably foreseen and anticipated in time to prevent injury. In no case must the carrier expose the passenger to extrahazardous dangers that might readily be discovered or anticipated by all reasonable, practicable care and diligence. Perhaps there is no essential difference between these views and those of Shipman, J., quoted above. It was therefore held that the carrier was liable for injuries inflicted on a passenger by a mob, consisting of striking workmen, enraged against non-union men employed in certain iron-works, the latter having been taken on the same train and in the same cars with the passengers, the existence of the mob being well known, the liability to attack such as might reasonably have been inferred, and the carrier not having taken proper precautions for the protection of the passengers. Magruder, J., and Shelton, C. J., dissented, adhering to the view of the court on the original hearing.

In conformity to the foregoing, it has also been held that a common carrier of passengers is bound to see that no harm comes to a passenger from a fellow-passenger, whose conduct and condition clearly show that he is a dangerous person, and likely to injure the other passengers: *King v. Ohio etc. R'y*, 22 Fed. Rep. 413. It is the duty of the employees of the company in charge of the train to keep such a person in close custody and disarm him, or remove him from the train: See *Vinton v. Middlesex R. R.*, 11 Allen, 304; 91 Am. Dec. 714, and note; *Railway Co. v. Valleley*, 32 Ohio St. 345; 30 Am. Rep. 601; *Lemont v. Washington etc. R. R.*, 1 Mackey, 180; 47 Am. Rep. 238; *Atchison etc. R. R. v. Weber*, 33 Kan. 543; 52 Am. Rep. 543. The employees of a railroad company constitute the police of the train, and the passenger, from the moment he enters the car, is entitled to look to them for protection in cases of assault growing out of the disorderly conduct of another passenger or passengers: *Flannery v. Baltimore etc. R. R.*, 4 Mackey, 111. So if the conductor and brakeman of a train conspire with passengers thereon to remove a colored passenger from a car, in which he had a right to be, or see such passengers remove him, and make no effort to prevent it, or make no effort to repair the mischief by restoring him to his seat, the company will be liable: *Murphy v. Western etc. R. R.*, 23 Fed. Rep. 637; and a somewhat similar case is *Britton v. Atlanta etc. R'y*, 88 N. C. 536; 43 Am. Rep. 749. In *New Orleans etc. R. R. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689, the plaintiff, a passenger on the defendant's cars, was assaulted by other passengers, and appealed to the conductor for protection. The conductor, after asking the assailants to desist, became frightened and ran away, and made no further effort to protect the plaintiff, who was thereupon beaten and injured. It was held that the conductor having failed to use the means at his disposal to protect the plaintiff, the defendant was liable. So in *Pittsburg etc. R. R. v. Pullou*, 76 Pa. St. 510, 18 Am. Rep. 424, a passenger on a railway train was injured through a quarrel between two drunken men, who were also passen-

gers. The conductor of the train witnessed the quarrel, but refused to interfere. It was held that the company was presumptively negligent, and liable for the injury. So, also, while a carrier of passengers is not responsible for the negligent acts of the passengers to the same extent as for its own servants, it is held bound to use the utmost skill and care of prudent men in taking precautions to prevent any passenger from being injured by the ignorant, negligent, or reckless acts of other passengers: *Simmons v. New Bedford etc. Steamboat Co.*, 97 Mass. 369; 93 Am. Dec. 99. A declaration which alleges that the plaintiff, while a passenger on one of the defendant's horse-cars, was injured by two men fighting thereon, through the defendant's negligence in failing to provide any conductor to preserve order on the car, and through the driver's negligence in failing to suppress the fight or eject the combatants, or otherwise to come to the plaintiff's assistance, or interfere to preserve order, is good on demurrer: *Holly v. Atlanta Street R. R.*, 61 Ga. 215; 84 Am. Rep. 97.

On the other hand, a carrier is not responsible for the results of a sudden, unlooked for, and violent attack committed by a passenger on a fellow-passenger, although the assailant was intoxicated, and had addressed insulting remarks to his fellow-passengers, but remained quiet after being admonished by the conductor: *Putnam v. Broadway etc. R. R.*, 55 N. Y. 108; 14 Am. Rep. 190; nor is a carrier liable for injuries caused during a fight between a mob or riotous crowd, which, at a regular station, rushed upon the cars in such numbers as to defy the power of the conductor to resist: *Pittsburgh R. R. v. Hinds*, 53 Pa. St. 512; 91 Am. Dec. 224; although if the conductor, with the forces at his command, could have resisted and prevented the fight or the entry of the improper persons, knowing them to be such, upon the train, the rule might have been different; nor is a railroad company liable in damages to a female passenger on account of vulgar and profane language, indecent exposure of person, and other disorderly conduct by intruders at a station while the plaintiff was waiting the arrival of a train, of which conduct the company did not know nor have reason to anticipate: *Botton v. South and North Alabama R. R.*, 77 Ala. 591; 54 Am. Rep. 80.

It should also be noticed that a carrier of passengers is not liable for every kind of injury sustained by a passenger from third persons. Thus where a passenger carries articles of great value upon his person without notice to or knowledge of the carrier, and they are violently taken from him by robbers, the carrier is not liable therefor in the absence of gross negligence or fraud, although the carrier was negligent in the exercise of its duty in protecting the passenger from violence: *Weeks v. New York etc. R. R.*, 72 N. Y. 50; 28 Am. Rep. 104; although in *Smith v. Wilson*, 31 How. Pr. 272 (U. S. Dist. Ct. South. Dist. Ala.), it was held that when the master of a coast steamer suffered a notorious gambler, a passenger on his vessel, to decoy a young man eighteen years of age, also a passenger, into playing upon a "sweat-cloth," by which the latter lost \$750 belonging to his widowed mother, the master was liable in admiralty, at the suit of the mother, for the whole amount of money and interest.

Whether these rulings, which are largely based on the high degree of care and diligence required of common carriers towards their passengers, will be applied with the same strictness to innkeepers, saloon-keepers, and the like, as in the principal case, is by no means evident. Innkeepers are truly in the exercise of a public employment, like common carriers of goods and of passengers; but they are certainly not insurers of the safety of the persons of their guests, no more than are common carriers insurers of the personal

safety of their passengers, however they may be with respect to the goods or the baggage of the guests or passengers, as the case may be; nor have the authorities yet gone so far as to impose the same degree of responsibility upon innkeepers as upon carriers of passengers concerning personal safety: See Schouler on Bailments and Common Carriers, sec. 323. It seems to us that, as regards this question, there is no essential difference between an innkeeper and a saloon, boarding-house, or lodging-house keeper, nor between the latter and any ordinary store-keeper. Each, undoubtedly, is bound to have a reasonably safe place for entertainment or the exhibition of goods, and should exercise a reasonable amount of care for the protection of his guests and customers: See *Gilbert v. Hoffmas*, 66 Iowa, 206; 55 Am. Rep. 263, and note. If, therefore, there is any reasonable apprehension of danger from third persons, or if personal injuries from third persons could have been prevented by the exercise of reasonable care and diligence, the proprietor might be guilty of negligence for his failure to use it, and consequently responsible in damages. The result reached by the principal case upon the facts is unquestionably correct, however the reasoning may be.

HOLLOWAY v. JACOBY.

[120 PENNSYLVANIA STATE, 563.]

IMPLIED WARRANTY THAT CORN IS GOOD AND SALABLE EXISTS where one to whom another has offered to sell a car-load of corn wrote that he would give a certain price per bushel for it, "provided it is good, salable corn," and the seller replied that he would accept the offer "for one car-load of corn."

ACTION originally brought before a justice of the peace by J. F. Holloway, trading as J. F. Holloway & Co., against C. Jacoby, to recover \$118.72, the amount the plaintiff had lost on a resale of a car-load of corn purchased by the plaintiff of the defendant. The justice gave judgment for the plaintiff. On appeal, the matter was submitted to a referee, who found that the defendant, who resided at Kerrsville, offered by letter, on March 19, 1884, to sell the plaintiff, residing at Phoenixville, a car-load of corn. The plaintiff accepted the offer by letter, the next day, as follows: "Your favor of 19th is received and noted. We will give 53c. per bus. for the car corn, provided it is good, salable corn. If you accept, consign to Collegeville, Pa., care P. & R., at Harrisville." The defendant, on the day following, responded: "Yours of the 20th to hand, contents noted. Will accept your offer for one car-load of corn, which I ship to-morrow." On the same day the defendant shipped to the plaintiff a car-load of corn, and drew on him for the price, \$283, which the plaintiff paid. When the corn reached its destination, on March 27, 1884, it was found that

a large portion of it was heated and spoiled. The plaintiff separated the good from the damaged, and sold it in lots for the best price obtainable, losing thereby the amount involved in this action. The corn must have been spoiled prior to shipment. It was not probable that it could have spoiled during the six days of transportation in March. It did not appear that the defendant, or those who loaded the corn, knew of its damaged condition. The plaintiff gave no notice to the defendant until after the sale, and two months after the delivery of the corn. The referee's conclusions were, that there was no warranty, express or implied; and there being no deceit or fraudulent representation, the plaintiff had no ground of action. Judgment having been entered for the defendant, the plaintiff brought this writ.

W. R. Murphy and John T. Stuart, for the plaintiff in error.

S. Hepburn, Jr., and Henderson and Hays, for the defendant in error.

PAXSON, J. The learned referee has found that there was no warranty in this case. If he is right in this, his conclusions are correct and his judgment must stand.

The defendant offered by letter to sell the plaintiff a car-load of corn. The plaintiff accepted it in these words: "Your favor of 19th is received and noted. We will give fifty-three cents per bushel for the car corn, provided it is good, salable corn. If you accept, consign to Collegeville, Pennsylvania," etc. The defendant replied: "Will accept your offer for one car-load of corn," etc. The acceptance of plaintiff's offer was an agreement to send him a car-load of good, salable corn, and not a car-load of corn generally, without any regard to quality, as was assumed by the referee. The fact was found that a large portion of the corn was spoiled when delivered. It had heated during transportation, or prior thereto. It is difficult to see how this could have occurred during the six days required for the transportation, as it was shipped in March; but with this we have nothing to do, and upon this point we accept the finding of the referee. We are of opinion that there was an implied warranty that the corn was good, salable corn. It was this the plaintiff bought, and the corn delivered was not of this description. Much of it was so badly damaged as to be almost worthless. The plaintiff sold it as best he could, and brought this action to recover the amount of his loss. We

are of opinion he is entitled to recover. In the case of a warranty a redelivery is not necessary: *Borrekins v. Bevan*, 8 Rawle, 23; 23 Am. Dec. 85.

Judgment reversed, and a *procedendo* awarded.

IN EXECUTORY CONTRACT FOR SALE OF PERSONAL PROPERTY, LAW IMPLIES that article shall be of merchantable quality without express stipulation: *Reed v. Randall*, 29 N. Y. 358; 86 Am. Dec. 305, and note 312-314; *Jones v. George*, 66 Tex. 149; 42 Am. Rep. 690.

ELLIS v. AMERICAN ACADEMY OF MUSIC.

[120 PENNSYLVANIA STATE, 608.]

DEFENDANT IN ACTION ON CASE FOR NUISANCE CANNOT OBJECT ON ERROR THAT DECLARATION SHOULD HAVE SET FORTH PREVIOUS VERDICT AND JUDGMENT recovered by the plaintiff against the defendant for the erection and continuance of such nuisance, and then have charged a continuance of the nuisance, instead of charging its erection as at a time subsequent to such verdict and judgment and its continuance from that time, where he waived the objection by going to trial on a plea of not guilty, instead of pleading the former recovery in bar, and where he was not injured, because under the plea he was not prevented from setting up such recovery as a bar to a recovery for the original erection, and the plaintiff was allowed to recover only for the continuance.

ONE IS ENTITLED TO DAMAGES FOR CONTINUANCE OF NUISANCE, established by a former verdict and judgment, although the continuance of the obstructions causing the nuisance did not materially injure him.

PUNITIVE DAMAGES FOR CONTINUANCE OF NUISANCE MAY BE GIVEN BY JURY, in an action brought after a former recovery by the plaintiff against the defendant.

GATE CLOSING PRIVATE ALLEY, AND ROOF COVERING IT, MAY BE PROPERLY ASSUMED TO BE NUISANCES PER SE by the court in its charge to the jury, in an action to recover damages for the continuance of the same as nuisances, brought by one adjoining owner against another, to whose lands the alley was made appurtenant, after a former recovery by the plaintiff against the defendant, the erections having been made after the grant to the plaintiff, and without his consent.

OWNERS OF LANDS BOUNDED ON PRIVATE ALLEY, WHO HAVE FREE USE THEREOF, HAVE SAME RIGHTS THEREIN that the public has in its highways; and if the alley is vacated, the soil belongs to them as tenants in common.

CASE, brought December 4, 1885, by the American Academy of Music against John Ellis, to recover damages for the alleged obstruction of a right of way. The first and second counts of the declaration alleged that the defendant, on November 3, 1884, and on divers other days and times between that day and the commencement of the action, wrongfully and inju-

riously placed and erected divers doors, gates, shedding, boards, piles of manure, and other materials over certain alleys, which were and still are greatly obstructed thereby. The defendant pleaded not guilty. It appeared that the plaintiff owned two lots fronting on the south side of Locust Street, in the city of Philadelphia, and extending backward from the street to the north side of a private alley, ten feet wide, running east and west, and leading in to another alley of the same width, leading southward into Lardner Street. The defendant also owned a lot or lots abutting on the alley, opposite the plaintiff's lots, on which he had erected a stable. By the several deeds under which the parties claimed, the lots of each were bounded on this alley, "with the free use, right, liberty, and privilege of the said ten-feet-wide alleys or courts, as passage-ways and watercourses, with or without horses, cattle, carts, and carriages, at all times forever, in common with the owners, tenants, and occupiers of other lots bounding thereon." The defendant had set some posts in the alley, and erected a shed over it. A gate across the alley, erected by some one after the parties had become the owners of their respective lots, had been removed by the defendant, and was closed by him nights. It was also claimed that the defendant cleaned his horses in the alley, and had used it for a place of deposit of manure. An action had been brought by the plaintiff against the defendant, at No. 3, September term, 1884, for the erection of the obstructions on January 1, 1880, and their continuance from that time up to the bringing of that suit on October 30, 1884, which resulted in a verdict and judgment for the plaintiff for ten dollars damages, and costs. The plaintiff had a verdict for four hundred dollars, and judgment having been entered thereon, the defendant took this writ, assigning as error that the court charged: 1. That if the alley should be vacated at any time, the soil of it would go in equal parts to the adjoining owners, unless it appeared that the soil was contributed more by one adjoining owner than the other; 2. That parties having the use of an alley which is free and unobstructed are entitled to the same use of it that the public is entitled to on its highways, and it was wrong for a private owner to shed over an alley if the other owners objected, no matter if they are not injured to any considerable extent; 3. That the shed was a legal obstruction, such as a court of equity, in view of the fact that there had been a previous verdict upon the same state of affairs, would have compelled the defendant to take down;

4. That the gate, having been erected after the parties had become the owners of their respective lots, was erected subject to objection by any person who did not consent to it; 5. That the deeds gave no such privilege as cleaning horses, and the owner of an alley had no right to turn it into a stable-yard; 6. That if the defendant made use of the alley for a stable-yard, he was liable therefor; 7. That the shedding was an obstruction for which the plaintiff was entitled to a verdict; 8. That the gate was such an obstruction as entitled the plaintiff to a verdict, and it was nothing that the inconvenience was small; 9. That the plaintiff might complain that in case of fire the firemen would have to tear down the shed before they could use a stream of water; 10. That the use the defendant made of the gate, together with the shed, might in time ripen into a right, by reason of which he would claim the entire ownership of the alley as part of the stable-yard; 11. That a former action established the plaintiff's rights, and therefore he was entitled to a verdict; 12. That for continuing the nuisance after a verdict for the plaintiff in a former action for the same injury, he was entitled to recover such damages as would punish the defendant and compel him to abate the nuisance. There were also certain points of the defendant refused, which it is unnecessary to notice.

George Junkin, for the plaintiff in error.

George W. Biddle and A. Sydney Biddle, for the defendant in error.

GORDON, C. J. This was an action on the case brought by the American Academy of Music against John Ellis for the alleged obstruction of the plaintiff's right of way over and upon two certain private ways or alleys adjacent to and appurtenant to the plaintiff's premises. The plaintiff's right to the free and unobstructed use of the said alleys was established by a previous verdict and judgment rendered in a suit between the same parties, and found in the records of the common pleas, No. 3, of the said county, at No. 3, September term, 1884, so that we need seek no further for the plaintiff's right. The principal obstructions complained of in that case were the erection by the defendant of a shed over one of the alleys, and the closing of it by one or more gates. The present action is substantially for the continuance of the same nuisance, though the *narr.* also charges the erection of the

same. As this forms the ground of one of the exceptions, we may as well consider it before proceeding further.

The counsel for the plaintiff in error alleges correctly that the *narr.*, in two of its counts, is for the erection of the obstructions on November 8, 1884, and their continuance from that date up to the bringing of the suit on December 4, 1885; whilst the *narr.* in the first suit charges for the erection of the obstructions on January 1, 1880, and their continuance from that time up to the bringing of that suit on October 30, 1884. He hence urges that the *narr.* in the present suit is in fault, in this, that it should have set forth the previous verdict and judgment, and then charged a continuance of the nuisance. Certainly the rules of strict pleading require what is here stated; but what then? The defendant was not injured thereby. Had the objection been made during the trial, the defect might have been cured by an amendment, and, at all events, he was not prevented from setting up the former judgment by way of estoppel to a recovery of damages for the original erection. Moreover, had the defendant chosen to take advantage of the former recovery, he should have pleaded it in bar, but instead of this, he chose to go to trial on the plea of not guilty, and so waived the defect. In this, the case is very similar to that of *Smith v. Elliott*, 9 Pa. St. 345, where, under the same defect in the declaration, a like objection was not only made but sustained in the court below. We however held the ruling to be erroneous, and Mr. Justice Rogers, in delivering the opinion of this court, said: "The defendant, instead of pleading the former recovery in bar of the action, pleads the general issue. It is not denied that the defendant may give in evidence a former recovery in an action on the case for a nuisance under the plea of not guilty, but it is not, as the court ruled, conclusive." A similar mistake was committed by the court of common pleas in the case of *Fell v. Bennett*, 110 Pa. St. 181, and was corrected here. These cases rule the point in controversy, and sustain the court below. Nor was the defendant injured thereby, for of the previous verdict he had all the advantage to which, under his plea, he was entitled, since the plaintiff was allowed to recover only for the continuance of the nuisance.

As most of the remaining assignments are altogether without merit, we will pass them, and notice but one or two of the others.

It is alleged that the obstructions did not materially injure

the plaintiff, and therefore no damages were recoverable. But as they were a constant challenge to the plaintiff's right to have a free and unobstructed way over the alleys, and also in view of the fact that a recovery was had for the erection of the nuisance, this doctrine cannot be entertained. If there was no injury to the plaintiff, there could be no nuisance, for the very definition of a nuisance is, "anything that unlawfully works hurt, inconvenience, or damage"; but the former verdict conclusively established the fact that the original obstructions came within the definition here given, and if the erections when first made were nuisances, how can the conclusion be avoided that their continuance must be injurious? In *McCoy v. Danley*, 20 Pa. St. 85, 57 Am. Dec. 680, we held that in an action for the continuance of a nuisance by means of a mill-dam, the plaintiff was entitled to such punitive damages as would compel the defendant to abate the nuisance, and this though the erection was of great value to the defendant, and the damage to the plaintiff inconsiderable. This, however, is but the restatement of a doctrine as old as the common law: no man may trespass upon another's right, however insignificant that right may be. On both reason and authority, therefore, the assignment under consideration cannot be sustained. We may here also call attention to the fact that this case disposes of the exception which impugns the instruction that the jury might give punitive damages.

Again, it is urged that the learned judge erred in assuming that the gate closing the alley, and the roof covering it, were *per se* nuisance. But how could he assume anything else in the face of the former verdict? A gate may or may not be an obstruction, depending upon circumstances, which were, in this case, properly defined, and left to the jury. A grant of a way, on which, at the time of the said grant, a gate is used, and the grantee suffers it to remain an indefinite length of time, must be construed, as was held in *Connery v. Brooke*, 73 Pa. St. 80, to have been taken subject to that encumbrance.

But clearly this rule cannot be applied to a case such as the present, where, at the time of the grant, there was no such obstruction, for otherwise the co-grantee would have the power to alter the conditions of the grant at any time he might see fit so to do. The same rule must apply to the covering of the alley. Not only did the former verdict determine the character of the erection, but without it, the question would nat-

urally arise, By what authority did Ellis undertake, without the assent of the academy, to make use of the way in this manner? It is true, the owner of the fee may use the servient soil as he pleases, so that he does not interfere with the right of his grantee, but Ellis was not the owner of the fee, and hence could not arrogate to himself the rights of such owner. The right, whether in the fee or only in the way, was common to both parties, so that neither, without the assent of the other, had the right to alter the character of the alley in any particular. Nor did the court err in charging that parties who are entitled to a free use of an alley have the same right in it that the public has in its highways, and that if the way in this case were vacated, the soil would belong to the plaintiff and defendant as tenants in common. By the several grants to these parties, their properties were not only bounded on the alley in controversy, but it was made appurtenant to those properties. Nothing, therefore, was left in the owner, and if the fee did not vest in these grantees, it is hard to tell where it is. The case is very much like that of *Holmes v. Billingham*, 7 Com. B., N. S., 829, in which Cockburn, C. J., says: "The direction complained of is, that the learned judge told the jury that there was a presumption in the case of a private way or occupation road between two properties, that the soil of the road belongs *usque ad medium* to the owners of the adjoining property on either side. That proposition, subject to the qualification which I shall presently mention, and which, I take it, was necessarily involved in what afterwards fell from the learned judge, is, in my opinion, a correct one. The same principle which applies to a public road, and which is the foundation of the doctrine, seems to me to apply with equal force to the case of a private road." As the doctrine here stated seems to be reasonable and sound, we cannot understand why we should not adopt it. It seems to be admitted that, were the alley public, its vacation would vest in each of the parties the unencumbered one half of the fee in severalty, and why this should not apply to a private way, where, just as in the case of a public way, by the grant it was made appurtenant to the several properties, we cannot understand. Without dwelling further on the assignments of error, we are led to the conclusion that in no particular was there a mistrial in the court below.

The judgment is affirmed.

FORMER RECOVERY FOR NUISANCE DOES NOT BAR A SUBSEQUENT RECOVERY for the continuance of the same nuisance: *Byrne v. Minneapolis etc. Ry Co.*, Minn. 1888.

EXEMPLARY DAMAGES MAY BE RECOVERED WHERE NUISANCE IS CONTINUED after verdict establishing the nuisance: *Soltan v. De Held*, 9 Eng. L. & Eq. 104; ——— *v. Deberry*, 1 Hayw. (N. C.) 248; *Carruthers v. Tillman*, 1 Id. 501; *Bradley v. Amis*, 2 Id. 399.

FIRE INSURANCE PATROL v. BOYD.

[120 PENNSYLVANIA STATE, 624.]

TRUE TEST OF LEGAL PUBLIC CHARITY IS OBJECT SOUGHT TO BE ATTAINED, the purpose to which the gift is to be applied, and not the motive of the donor.

INSURANCE PATROL COMPANY IS PUBLIC CHARITY when the object of its incorporation is to protect and save life and property in and contiguous to burning buildings, it appearing that the company made no distinction in saving and protecting property between property insured and not insured, and that it was without capital stock or moneyed capital, and no profits or dividends were made and divided among the corporators, although it is supported by the voluntary contributions of fire insurance companies.

INSURANCE PATROL COMPANY, CONSTITUTING PUBLIC CHARITY, IS NOT LIABLE FOR NEGLIGENCE OF ITS EMPLOYEES, it having no property or funds other than that contributed for the purposes of charity.

CASE by the widow and minor son of Charles S. Boyd against the Fire Insurance Patrol of the City of Philadelphia, a corporation, and James A. Hutchinson and Andrew C. Koochogey, two of its employees, to recover damages for the killing of Boyd through the alleged negligence of the defendants. It appeared that the company, a few days after a fire had occurred in a certain store, sent Hutchinson and Koochogey, two of its patrolmen, to remove the tarpaulins which had been used by the company on the fourth floor of the building to protect the goods therein from injury by water. The men folded the tarpaulins into bundles, and, instead of lowering them by a convenient hoist, they determined to pitch them out of the window to the pavement below. Koochogey went and stood upon the sidewalk to warn passers-by, and Hutchinson remained in the fourth story and threw out the bundles. While they were thus engaged, the deceased came out of his store, a few doors above, started to cross the street, but turned, and while approaching the sidewalk, was struck by a bundle, causing injuries from which he died. The deceased was very near-sighted, and wore spectacles. Koochogey cried out to

him, but it was too late. The bundles were quite large, and each weighed about fifty pounds. The court ordered a nonsuit as to the company and Koochogey, and the jury rendered a verdict against Hutchinson. On error, the supreme court, in *Boyd v. Insurance Patrol*, 113 Pa. St. 269, affirmed the judgment as to Koochogey, but reversed it as to the company. On this second trial against the company, as defendant, verdict and judgment were recovered, whereupon it took this writ of error. The questions involved are stated in the opinion.

George W. Biddle, Arthur Biddle, and H. La Barre Jayne, for the plaintiff in error.

George Junkin, for the defendants in error.

PAXSON, J. When this case was here upon a former writ of error (see 113 Pa. St. 269), we did not decide the question whether the Fire Insurance Patrol was such a corporation as to be exempt from the rule of *respondere superior*, for the reason that we had little before us but the charter itself, and that was not regarded as sufficient to show satisfactorily the character of the corporation. The case now comes up to us with additional light, and we have no difficulty in arriving at a conclusion.

Of the forty-two assignments of error I shall discuss only six; viz., the thirtieth to the thirty-fifth, inclusive. The first five of these assignments present in various forms the question whether the Insurance Patrol is a public charity, while the thirty-fifth alleges that the court below erred in not giving the jury a binding instruction that the defendant was not liable in this action.

As disclosed by the charter, "the object of the corporation was to protect and save life and property in or contiguous to burning buildings, and to remove and take charge of such property or any part thereof when necessary." As disclosed by the evidence, it appears to be a corporation without capital stock or moneyed capital; that it is supported by voluntary contributions derived from different fire insurance companies; that its object and business is to save life and property in or contiguous to burning buildings; that in saving and protecting such property, no difference is made between property insured and property which is not insured; that no profits or dividends are made and divided among the incorporators.

Passing by for the present the question of a public charity, it seems plain that this corporation might well have been

created by the state in aid of the municipal government of the city of Philadelphia. It is one of the recognized functions of municipal government to suppress and extinguish fires. For this purpose the city has a paid fire department, which has taken the place of the volunteer fire department formerly in existence. It is as much the province or duty of the city to save life and property at fires as to extinguish such fires, and the Fire Insurance Patrol might well have been organized as an auxiliary to the city government, and placed under its direct control. That it aids the city as a volunteer does not alter the fact that it is still an auxiliary of the municipal government, performing functions which that government might properly perform, just as did the old volunteer fire department.

Is the Insurance Patrol a public charitable institution? The learned court below held that it was not, upon the ground that the main object of the institution was to benefit the insurance companies, who were the chief contributors to its funds. In other words, the learned judge tested the nature and character of the institution by the motives of its contributors. We might be driven to the same conclusion were we to adopt Mr. Binney's definition as found in his argument in the Girard will case, as the test of a public charity, where he said: "It is whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense,—given from these motives, and to those ends, free from the stain or taint of every consideration that is personal, private, or selfish." This is undoubtedly charity in its highest and noblest sense. The Recording Angel might well point to it with satisfaction; and it may be the test in the Great Hereafter, but were we to apply it to the transactions of this wicked world, I fear it would lead to serious embarrassment. In the first place, it is utterly impracticable, for it is God only who can look into the heart and judge of motives. In the second place, if we had the power of omniscience and were to apply it, what would be the result? How many of our noblest and most useful public charities would stand such a test? How many donations to public charities are made out of pure love to God and love to man, free from the stain or taint of every consideration that is personal, private, or selfish? Who can say that the millionaire who founds a hospital or endows a college, and carves his name thereon in imperishable marble, does so from love to God, and love to his fellow, free from the stain of selfishness?

Yet, is the hospital or the college any the less a public charity because the primary object of the founder or donor may have been to gratify his vanity, and hand down to posterity a name which otherwise would have perished with his millions? There is ostentation in giving, as well as in the other transactions of life. In some instances donations to public charities may be in part due to this cause; in others, there may be the expectation of indirect pecuniary gain or return. The professional man who gives freely to his church may not be insensible to the fact that liberality makes friends and sometimes increases clientage. Coiled up within many a gift to a public charity, there is a secret motive, known only to the searcher of all hearts. It may be to benefit the donor in this world, or to save his soul in the next. It would be as vain as it would be unprofitable for a human tribunal to speculate upon the motives of men in such cases. Nor is it necessary for any legal purpose. The money which is selfishly given to public charity does as much good as that which is contributed from a higher motive, and in a legal sense the donor must have equal credit therefor. We must look elsewhere for a definition of a legal public charity.

In *Morice v. Bishop of Durham*, 9 Ves. 405, it was said by Sir William Grant that those purposes are considered charitable which are enumerated in the statute of 43 Elizabeth, or which by analogy are deemed within its spirit and intentment. It is true that this statute of Elizabeth is not in force in Pennsylvania, but its principles are a part of the common law: *Cresson's Appeal*, 30 Pa. St. 450. In *British Museum v. White*, 2 Sim. & St. 596, a charitable gift was defined to be "every gift for a public purpose, whether local or general, although not a charitable use within the common and narrow sense of those words." In *Jones v. Williams*, Ambler, 651, Lord Camden gives this practical definition, viz.: "A gift to a general public use which extends to the poor as well as to the rich." This definition has been repeatedly approved by this and other courts: See *Wright v. Linn*, 9 Pa. St. 433; *Coggeshall v. Pelton*, 7 Johns. Ch. 294; 11 Am. Dec. 471; *Milford v. Reynolds*, 1 Phill. Ch. 191; *Perrin v. Carey*, 24 How. 506; *Jackson v. Phillips*, 14 Allen, 556.

These brief citations from the English authorities are deemed sufficient. I now turn to our own and other states. In *Cresson's Appeal*, 30 Pa. St. 437, this court, after citing with approval *Jones v. Williams*, *supra*, said: "In order to ascertain

what are charitable uses, the English courts have generally resorted to the preamble of the act of Parliament, 43 Elizabeth. That enumerates twenty-one, and among them are found the following: Repairs of bridges; repairs of ports and havens; repairs of causeways; repairs of sea-banks; repairs of highways; fitting out soldiers; other taxes. And beyond the enumeration contained in that act, many other gifts have been recognized as common-law gifts to charitable uses; for example: for cleansing the streets; maintenance of houses of correction; for the true labor and exercise of husbandry; for public benefit. These cases and many others are collected in *Magill v. Brown*, Brightly, 347. It is true, the statute of Elizabeth is not in force as a statute in Pennsylvania; but, as before stated, its principles are part of our common law. The case of *Magill v. Brown*, *supra*, was a Pennsylvania case, and there it was held that a bequest for a fire-engine and hose was a gift for a charitable use." In *Jackson v. Phillips*, 14 Allen, 556, a charity was defined by Justice Gray as follows: "A charity, in legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." This definition has been cited approvingly, not only by text-writers, but by other courts. In *Miller v. Porter*, 53 Pa. St. 292, there was a bequest by Porter to a university which was to bear his name, and this court said: "You say it [the Porter University] was not founded to promote religion or religious education, but to immortalize the founder, and therefore it was not a charity. If the premises be granted, the conclusion does not follow, because though it has no stamp of religion, and the selfishness of motive may take away from it the high and abstract quality of a Christian charity, yet it was to be a seat of learning,—a university,—a center from which the rays of educated intelligence were to radiate in all directions; and if to found a school-house at the cross-roads of a township be a legal charity, though the selfish motive be apparent, much more to found such a university is a legal charity; and if a charity within the legal sense of that word, then it is as much within the purview of the statute as a bequest

to the West Town School, and *Price v. Maxwell* rules the case." Following in this line of thought is *Manners v. Library Co.*, 93 Pa. St. 165, where it was held, in the case of a public charity, that the intent of the testator will not be defeated because a secondary intent may be illegal, for if it be unlawful it will be disregarded. In *Appeal of Humane Fire Company*, 88 Id. 389, it was distinctly ruled by this court that the association was a public charity. That company was one of the members of the old volunteer fire department of the city of Philadelphia, was organized for the purpose of extinguishing fires, and was supported just as the Fire Insurance Patrol is supported, by voluntary contributions. It is true, many of its contributions came from private citizens, but I am unable to see any distinction between contributions to a fire company or insurance patrol made by individuals and those made by corporations. In both cases a corresponding benefit is expected. It would be idle to say that the insurance companies do not expect to diminish their losses by their support of the Insurance Patrol. But has the private citizen who contributes to a fire company any higher motive? Does he pay his money out of love to God and love to man? or does he pay it to protect his property?

It will be noticed that in no one of the cases cited is the motive of the donor made a test of a charity. While it is true that a gift within the definition of Mr. Binney is a good charitable use, and in a moral sense perhaps the best, it has never been held that said definition is a test of a charity. On the contrary, this court held in *Martin v. McCord*, 5 Watts, 493, 30 Am. Dec. 342, that the accession to a charity need not be by gift, but may be by contract; and that the accession to the charitable use from one who gave ground for a school-house, if the neighbors would go on and build a decent house on it for the benefit of the neighborhood, and for the benefit of his grandson John, whom he wished to send to school, was good; and Sergeant, J., said "not as a gift, but as a purchase for a valuable consideration," and the neighbors were the trustees for a charitable use. And in *Miller v. Porter*, *supra*, we have already seen that this court expressly repudiated the idea that the selfish motive affected the legal nature of the gift or use, and held that the object of the bequest only, and not the motive, governed its legal effect. The true test of a legal public charity is the object sought to be attained,—the

purpose to which the money is to be applied,—not the motive of the donor.

Our conclusion is, that the Fire Insurance Patrol of Philadelphia is a public charitable institution; that in the performance of its duties it is acting in aid and in ease of the municipal government in the preservation of life and property at fires. It remains to inquire whether the doctrine of *respondeat superior* applies to it. Upon this point we are free from doubt. It has been held in this state that the duty of extinguishing fires and saving property therefrom is a public duty, and the agent to whom such authority is delegated is a public agent, and not liable for the negligence of its employees. This doctrine was affirmed by this court in *Knight v. City of Philadelphia*, 15 Week. Not. 307, where it was said: "We think the court did not commit any error in entering judgment for the defendant upon the demurrer. The members of the fire department are not such servants of the municipal corporation as to make it liable for their acts or negligence. Their duties are of a public character, and for a high order of public benefit. The fact that this act of assembly did not make it obligatory on the city to organize a fire department does not change the legal liability of the municipality for the conduct of the members of the organization. The same reason which exempts the city from liability for the acts of its policemen applies with equal force to the acts of the firemen." And it would seem from this and other cases to make no difference, as respects the legal liability, whether the organization performing such public service is a volunteer or not: *Jewett v. City of New Haven*, 38 Conn. 379; 9 Am. Rep. 382; *Russell v. Men of Devon*, 2 Term Rep. 672; *Feoffees of Heriot's Hospital v. Ross*, 12 Clark & F. 506; *Riddle v. Proprietors of the Locks*, 7 Mass. 187; 5 Am. Dec. 35; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *Boyd v. Insurance Patrol*, 113 Pa. St. 269. But I will not pursue this subject further, as there is another and higher ground upon which our decision may be placed.

The Insurance Patrol is a public charity; it has no property or funds which have not been contributed for the purposes of charity, and it would be against all law and all equity to take those trust funds, so contributed for a special, charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants of the patrol. It would be carrying the doctrine of *respondeat superior* to an unreason-

able and dangerous length. That doctrine is, at best, as I once before observed, a hard rule. I trust and believe it will never be extended to the sweeping away of public charities; to the misapplication of funds, specially contributed for a public charitable purpose, to objects not contemplated by the donors. I think it may be safely assumed that private trustees, having the control of money contributed for a specific charity, could not, in case of a tort committed by one of their members, apply the funds in their hands to the payment of a judgment recovered therefor. A public charity, whether incorporated or not, is but a trustee, and is bound to apply its funds in furtherance of the charity, and not otherwise. This doctrine is hoary with antiquity, and prevails alike in this country and in England, where it originated as early as the reign of Edward V., and it was announced in the Year-Book of that period. In *Fooffees of Heriot's Hospital v. Ross*, 12 Clark & F. 506, a person eligible for admission to the hospital brought an action for damages against the trustees for the wrongful refusal on their part to admit him. The case was appealed to the house of lords, when it was unanimously held that it could not be maintained. Lord Cottenham said: "It is obvious that it would be a direct violation, in all cases, of the purpose of a trust if this could be done; for there is not any person who ever created a trust that provided for payment out of it of damages to be recovered from those who had the management of the fund. No such provision has been made here. There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects which the author of the fund had in view, but would be to divert it to a completely different purpose." Lord Brougham said: "The charge is, that the governors of the hospital have illegally and improperly done the act in question, and therefore because the trustees have violated the statute, therefore—what? Not that they shall themselves pay the damages, but that the trust fund which they administer shall be made answerable for their misconduct. The finding on this point is wrong, and the decree of the court below must be reversed." Lord Campbell: "It seems to have been thought that if charity trustees have been guilty of a breach of trust, the persons damnified thereby have a right to be indemnified out of the trust funds. That is contrary to all reason, justice, and common sense. Such a

perversion of the intention of the donor would lead to most inconvenient consequences. The trustees would, in that case, be indemnified against the consequences of their own misconduct, and the real object of the charity would be defeated. Damages are to be paid from the pocket of the wrong-doer, not from a trust fund. A doctrine so strange as the court below has laid down in the present case ought to have been supported by the highest authority. There is not any authority, not a single shred, here to support it. No foreign or constitutional writer can be referred to for such a purpose." I have quoted at some length from the opinions of these great jurists because they express in vigorous and clear language the law upon this subject. I have not space to discuss the long line of cases in England and this country in which the above principle is sustained. It is sufficient to refer to a few of them by name: *Riddle v. Proprietors of the Locks*, 7 Mass. 187; 5 Am. Dec. 35; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *Sherbourne v. Yuba Co.*, 21 Cal. 113; 81 Am. Dec. 151; *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402; 20 Am. Rep. 709; *Mitchell v. City of Rockland*, 52 Me. 118; *City of Richmond v. Long*, 17 Gratt. 375; *Ogg v. City of Lansing*, 35 Iowa, 495; 14 Am. Rep. 499; *Murtaugh v. City of St. Louis*, 44 Mo. 479; *Patterson v. Pennsylvania Reform School*, 92 Pa. St. 229; *Maximilian v. Mayor*, 62 N. Y. 160; 20 Am. Rep. 468.

I am glad to be able to say that no state in this country, or in the world, has upheld the sacredness of trusts with a firmer hand than the state of Pennsylvania. Not only is a trustee for a public or private use not permitted to misapply the trust funds committed to his care, but if he convert them to his own use, the law punishes him as a thief. How much better than a thief would be the law itself were it to apply the trust's funds, contributed for a charitable object, to pay for injuries resulting from the torts or negligence of the trustee. The latter is legally responsible for his own wrongful acts. I understand a judgment has been recovered against the individual whose negligence occasioned the injury in this case. If we apply the money of the Insurance Patrol to the payment of this judgment, or of the same cause of action, what is it but a misapplication of the trust fund, as much so as if the trustees had used it in payment of their personal liabilities? It would be an anomaly to send a trustee to the penitentiary for squandering trust funds in private speculations, and yet permit him to

do practically the same thing by making it liable for his torts. If the principle contended for here were to receive any countenance at the hands of this court, it would be the most damaging blow at the integrity of trusts which has been delivered in Pennsylvania. We are not prepared to take this step.

We are not unmindful of the fact that it was contended for the defendant in error that the case of *Fooffees of Heriot's Hospital v. Ross* is in conflict with *Mersey Docks etc. Trustees v. Gibbs*, L. R. 1 H. L. 93, and *Parnaby v. Lancaster Canal Co.*, 11 Ad. & E. 223. I am unable to see any such conflict. The two corporations last named were evidently trading corporations, and in no proper sense public charities. In regard to the docks, it was said by Blackburn, J., at page 465: "There are several cases relating to charities which were mentioned at your lordship's bar, but were not much pressed, nor, as it seems to us, need they be considered now; for whatever may be the law as to the exemption of property occupied for charitable purposes, it is clear that the docks in question can come within no such exemption."

I will not consume time by discussing the case of *Glavin v. Rhode Island Hospital*, 12 R. I. 141, 34 Am. Rep. 675, which, to some extent, sustains the opposite view of this question. There a hospital patient paying eight dollars per week for his board and medical attendance was allowed to recover a verdict against the hospital for unskillful treatment; and it was held that the general trust funds of a charitable corporation are liable to satisfy a judgment in tort recovered against it for the negligence of its officers or agents. It is at least doubtful whether, under its facts, the case applies; and if it does, we would not be disposed to follow it in the face of the overwhelming weight of authority the other way, and of the sound reasoning by which it is supported.

The foregoing is little more than a reassertion of the views of this court, as heretofore expressed in this case by our brother Clark: See *Boyd v. Insurance Co.*, 113 Pa. St. 269. Many of the authorities I have referred to are there cited by him. We are now more fully informed as to the facts of the case, and can apply to them the law as indicated in the former opinion.

We are all of opinion that the Insurance Patrol is not liable in this action, and the judgment against it is therefore reversed.

CHARITABLE BEQUESTS. — Legacy to a town, for the purpose of erecting a town-house for transacting town business, is valid as a charitable bequest: *Coggeshall v. Patten*, 7 Johns. Ch. 292; 11 Am. Dec. 471.

MUNICIPAL CORPORATION IS NOT ANSWERABLE FOR THE ACTS OF FIRE-MAN, whether volunteer or not: *Jewett v. City of New Haven*, 38 Conn. 368; 9 Am. Rep. 382; *Fisher v. City of Boston*, 104 Mass. 87; 6 Am. Rep. 196; *Wheeler v. City of Cincinnati*, 19 Ohio St. 19; 2 Am. Rep. 368; note to *Lloyd v. Mayor*, 55 Am. Dec. 349.

PUBLIC CHARITABLE INSTITUTIONS ARE NOT ANSWERABLE FOR NEGLIGENCE OF THEIR AGENTS, selected with due care: *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *Sherbourne v. Yuba County*, 21 Cal. 113; 81 Am. Dec. 151; *Murtaugh v. St. Louis*, 44 Mo. 481; *contra, Glavin v. Rhode Island Hospital*, 12 R. I. 411; 34 Am. Rep. 675.

SCRANTON CITY'S APPEAL.

[121 PENNSYLVANIA STATE, 97.]

MUNICIPAL CORPORATION. — COURT OF EQUITY WILL NOT ENJOIN CITY FROM REBUILDING AND ENLARGING CULVERT across a street, upon the complaint of a property-owner alleging that by reason of the increased volume of water consequent upon the work proposed his lot will be injured, although for fifteen years the water was carried through a more limited channel.

BILL in equity filed by John Goulden and Bridget Goulden against the city of Scranton and Martin Dwyer, to restrain the reconstruction and enlargement of a culvert across Railroad Avenue, in said city. Other facts appear in the opinion. The decree was in favor of the complainant, and the defendant appealed.

J. H. Burns, for the appellant.

Louis A. Waters, for the appellees.

GREEN, J. The master finds that the plaintiffs' lot is located upon the line of a natural course of surface drainage; that for some distance above the lot this line is marked by a ravine in which a small stream formerly flowed, kept alive by springs which have since failed; but that for fifteen years past the surface water has run in this ravine, usually a small stream, occasionally dry, and in heavy rains a torrent. It is apparent that if no culvert had been built across Railroad Avenue for this water to go through, the ravine would have continued open, and all the water that came into it would have flowed through it, and in time of flood would have been precipitated upon the plaintiffs' land without restriction. If the culvert were taken away now, the same result would follow. But the preservation of the culvert is presumably necessary in order to

sustain the street above it. When it was built, it might as easily have been built five feet wide and five feet high, as three feet wide and three feet high, but the latter dimensions, being supposed sufficient, were adopted. It appears now they are not sufficient, and therefore in rebuilding the culvert it is made of the larger dimensions.

It seems rather singular that an injunction should be awarded against such an exercise of corporate authority as this. The purpose of the increased size of the culvert manifestly is to carry off the water in time of flood, and thus prevent it from damming up and overflowing the adjacent territory. Certainly this is an entirely legitimate purpose, to be encouraged rather than repressed or restrained. As the whole of the water must have gone down this natural water-course if it had remained in a state of nature, it is difficult to understand why a mitigated flow through a restricted limit should be the subject of a restraining injunction. The argument that it was for fifteen years carried through a still more limited channel, and therefore that limit cannot now be exceeded, is entirely without force. The three-foot limit was not a natural one, and the case therefore is not one of a proposed increase in the size of the natural channel, but it was an artificial channel, found now to be insufficient in size, and therefore necessarily to be enlarged, but still much less than the natural channel.

The authorities cited in the opinion of the court, and in the argument for the appellees, which hold that surface waters cannot be gathered together and cast upon a citizen's land, even by a municipality, or that a natural channel cannot be increased in size and made to carry an increased flowage, are inapplicable. Having said this much, it is only necessary to add that the diversion of an increased surface flow into the natural drain or ravine, more than was accustomed to find its outlet in that way, is not the subject of complaint in the plaintiffs' bill, and no relief is asked against the defendant on that ground. The decree made by the court below has nothing to rest upon in the pleadings, and cannot be sustained. If the plaintiffs desire to obtain redress for an increased flowage of surface water into the natural drain by artificial means, let them proceed in some appropriate form for such an injury. They have not done so in the present proceedings.

Decree reversed, and bill dismissed at the cost of the appellees.

EVIDENCE THAT THE PLAN ON WHICH A SEWER HAS BEEN CONSTRUCTED by municipal authorities had not been judiciously selected is inadmissible to support an action against the municipality by the owner of land injured by the overflow of water from the sewer: *Johnston v. District of Columbia*, 118 U. S. 19. See note to *Saifert v. City of Brooklyn*, 54 Am. Rep. 664.

COMMONWEALTH v. FITZPATRICK.

[121 PENNSYLVANIA STATE, 102.]

CRIMINAL LAW—JEOPARDY WITHIN MEANING OF PROVISION OF PENNSYLVANIA CONSTITUTION, article 1, section 10, that "no person shall for the same offense be twice put in jeopardy of life and limb," is the peril in which a defendant is put when he is regularly charged with crime before a tribunal properly organized, and competent to try him. From this jeopardy he is to be relieved, if relieved at all, by the verdict of the jury.

IN CAPITAL CASE, COURT HAS NO POWER TO DISCHARGE JURY after the commencement of the trial, without the consent of the prisoner, unless an absolute necessity requires it. Mere inability of the jury to agree within a few hours or days is not such a necessity; nor is the fact that the regular term is approaching an end, for the courts have power to continue the term until the case can be properly ended.

INDICTMENT for murder. The opinion states the case.

H. M. Edwards, district attorney, for the plaintiff in error.

Frederick W. Gunster and Charles H. Welles, for the defendants in error.

WILLIAMS, J. The defendants in error, who were defendants below, were indicted and put on trial for murder. At the conclusion of the evidence, the questions involved were discussed by counsel, and the jury, after the charge of the court, retired to deliberate upon their verdict. This was on the first day of February, 1887. On the 5th of the same month, which was Saturday, and the last day of the regular term of the court, the jury, not having agreed upon a verdict, was discharged by the court, notwithstanding the objection of the defendants. The learned judge of the oyer and terminer caused the following adjudication to be entered on the minutes: "Now, to wit, 5th February, 1887, the jury in this case having come into court repeatedly, and affirmed that they could not agree, and that they had made every possible effort to agree, and that they still cannot agree, the term of the court now expiring, the court being satisfied that it is useless to detain the jury longer, the jury are discharged from the further con-

sideration of the case, to which order and discharge the defendants except, at whose request a bill is sealed."

The defendants were again called for trial in the following month of May, and pleaded specially the former trial and the discharge of the jury without rendering a verdict in bar of any further trial for the same offense. The commonwealth demurred to this plea, and the court, after argument, entered judgment on the demurrer in favor of the defendants, and discharged them from custody. The question thus raised is, whether the facts set forth in the special plea show that the defendants have been once in jeopardy for the offense now charged against them. If so, the constitutional provision that "no person shall for the same offense be twice put in jeopardy of life or limb," is a conclusive answer to the indictment.

Jeopardy is the peril in which a defendant is put when he is regularly charged with crime before a tribunal properly organized and competent to try him. He must, under such circumstances, submit the sufficiency of his defense to the decision of a jury of his peers. He is in their hands exposed to the danger of conviction, with all its consequences; or, in the language of the bill of rights, he is "in jeopardy." From this jeopardy he is to be relieved, if relieved at all, by the verdict of the jury. Unless some overriding necessity arises after the jeopardy begins, the trial must proceed until it ends in a conviction or an acquittal. In a capital case, therefore, the court has no power to discharge a jury without the consent of the defendant, unless an absolute necessity requires it: *Commonwealth v. Cook*, 6 Serg. & R. 577; 9 Am. Dec. 465. The mere inability of the jury to agree within a few hours or days is not such a necessity: *Commonwealth v. Clue*, 3 Rawle, 498; nor is the fact that the regular term is approaching an end, for the courts have power to continue the term until the case can be properly ended.

The serious illness or insanity of the defendant, and the illness, insanity, or death of the judge or a juror engaged in the trial, have been held to create a necessity for the withdrawal of a juror, and a postponement of the trial; and it is not difficult to imagine other cases in which a similar holding should be made. In this case, however, we take notice of the fact that Lackawanna County constitutes a judicial district, with a president and an additional law judge. The adjudication does not suggest any reason why the term could not have been extended, and we assume that there was none. There

was therefore no case of necessity presented by the facts stated in the adjudication, nor did the learned judge undertake to put a finding of such necessity upon the record. The adjudication only asserts that "the court is satisfied that it is useless to detain the jury longer," and then directs their discharge. This order was a mistake. It was made in disregard of the protest of the defendants. They were in jeopardy when the order was made, and its effect was to end the trial and the jeopardy without a verdict and without their consent. When they were again called upon to answer and subject themselves to the jeopardy of a trial, they had a right, under the constitution, to say: "We have been once put in jeopardy for this crime, and we cannot be compelled to undergo the same peril a second time for the same offense." This was the effect of their special plea, and it was unanswerable: *Peiffer v. Commonwealth*, 15 Pa. St. 468; 53 Am. Dec. 605; *McFadden v. Commonwealth*, 23 Pa. St. 12; 62 Am. Dec. 308; *Alexander v. Commonwealth*, 105 Pa. St. 1; *Hilands v. Commonwealth*, 111 Id. 1; 56 Am. Rep. 235.

There may be room to doubt the wisdom of the constitutional provision in its present form, but there is no room for discussion as to its effect. The justice of sustaining a plea of former acquittal or conviction is unquestioned and unquestionable; but a plea of "once in jeopardy" stands on narrower, more technical, and less substantial ground. It alleges only that there might have been a conviction or an acquittal, if the judge trying the cause had not made a mistake in law which prevented a verdict. It is of no consequence how many mistakes he makes, if the trial results in a conviction. The mistakes can be corrected on a writ of error, and the defendant tried over again. But if the mistake results in closing the trial without a verdict, this is remediless. The court that made it cannot correct it. The proper court of review cannot correct it. The consequence is, that a defendant charged with taking the life of his fellow-man goes out of the court and out of the reach of justice because of a mistake in law made after an honest and painstaking effort to be right. Such was the case of *Hilands v. Commonwealth*, *supra*. Such is this case. But the constitutional provision is plain, and its enforcement by the courts has been uniform.

The judgment entered upon the demurrer was right, therefore, and it is now affirmed.

PRISONER IS IN JEOPARDY WHEN IN A COURT OF COMPETENT JURISDICTION he is placed on trial under an indictment sufficient in form and substance to sustain a conviction: *State v. Ward*, 48 Ark. 36; 3 Am. St. Rep. 212, and note.

UNNECESSARY DISCHARGE OF JURY WITHOUT PRISONER'S CONSENT entitles prisoner to set up plea of once in jeopardy: *State v. Ward*, 48 Ark. 36; 3 Am. St. Rep. 212, and note.

GREEN v. RICK.

[121 PENNSYLVANIA STATE, 132.]

BOND. — IN JOINT OBLIGATION, VOLUNTARILY ASSUMED, EACH OBLIGOR OWES to the others the exercise of good faith for their joint interest. A confidential relation exists between them, each owes a duty to the others to disclose anything affecting the joint interest, and each represents the others in matters relating to the payment and discharge of their joint liability.

DEED. — CONVEYANCE IN FORM OF DEED, "UNDER AND SUBJECT" TO LIEN OF MORTGAGE securing the grantor's bond, creates a covenant on the part of the grantees to indemnify the grantor against the mortgage debt.

LIEN PENDENS. — WHEN PROPERTY ACTUALLY IN LITIGATION IS BOUGHT, PENDING SUIT, from a party thereto, though upon a valuable consideration, and without express or implied notice in point of fact, the purchaser is affected in the same manner as if he had notice, and will accordingly be bound by the judgment or decree in the suit. But the purchaser of land subject to the lien of a mortgage is not affected by *lis pendens*, where the title to the mortgage only was involved in the suit, and not the land itself.

MORTGAGEE. — PURCHASER OF LAND SUBJECT TO MORTGAGE HAS RIGHT TO SUPPOSE, in the absence of notice to the contrary, that the ownership of the mortgage was as it appeared upon the record, and having made payment in good faith upon this assumption, he is entitled to protection, upon the principle that when one of two innocent persons must suffer loss by the default of a third, their rights being otherwise equal, that one should bear the loss who put it in the power of the defaulter to inflict it.

LI. — ALL CO-OBLIGORS IN JOINT BOND SECURED BY MORTGAGE ARE LIABLE for the amount of the bond, although the purchaser of the land subject to the mortgage has discharged the latter by payment to the mortgagee of record, such payment having been made in good faith and without notice that the debt secured by the bond was payable to another; and in a suit against the obligors, in which such purchaser is made a party defendant, if judgment is had against the defendants generally, it will be vacated as to him and sustained against the other defendants, the obligors.

ACTION of debt by John S. Rick for use of Richard Wenrich, executor of Magdalena Peiffer, deceased, against Albert G. Green, Joshua Keely, and Fannie A. Keely, his wife, to recover the amount of indebtedness on a bond made payable to

Rick. Before the trial, the Northwest Building and Savings Association, on its own petition, was made a party defendant to the suit, and was permitted to defend *pro interesse suo*. On the trial, it appeared that the defendants, Green, Keely, and wife, borrowed money from Rick, giving him their joint bond for the amount, and a mortgage on land owned by them. The money loaned by Rick belonged to one Magdalena Peiffer, who, by a deed of trust, had transferred her property to him upon certain trusts therein designated. Mrs. Peiffer afterwards executed a deed revoking the deed of trust, and filed a bill in equity averring Rick's refusal to surrender the trust property, including said bond, and praying for a decree directing him to do so. The court so decreed, and the decree was affirmed by the supreme court on appeal: See *Rick's Appeal*, 105 Pa. St. 528. Pending said suit in equity, Green, Keely, and his wife conveyed the mortgaged property to the said building association, subject to the mortgage, and the association paid the mortgage to Rick, who executed a satisfaction of it, and turned the bond over to the association. Green was counsel for Rick in the equity suit, was present when the mortgage was paid, and did not disclose the fact of the revocation of the deed of trust. Mrs. Peiffer having died, this action was brought by her executor to recover the amount of the bond, Rick having refused to pay it. Verdict and judgment for the plaintiff, and the defendants assigned error.

Isaac Hiester, H. A. Zieber, and W. P. Bard, for the plaintiffs in error.

Cyrus G. Derr, George F. Baer, and Jeff Snyder, for the defendant in error.

CLARK, J. In *Rick's Appeal*, 105 Pa. St. 528, it was distinctly held that the deed of trust executed March 16, 1878, by Magdalena Peiffer to John S. Rick, was a mere instrument of agency, and was therefore revocable at pleasure; that the deed of July 6, 1881 [June 30?], and notice thereof on July 12th following, was in effect a complete cancellation of that conveyance, and that all rights arising under the trust thereby ceased. It is true, the deed contained no express power of revocation, but, as it was in the nature of a letter of attorney only, it might be revoked at will. The proceeding by bill in equity was simply in enforcement of the rights accrued under the revocation; the decree of the court was an

adjudication in form of what did exist in fact. This being so, the bond in suit was, on December 8, 1883, properly payable to Magdalena Peiffer, and not to John S. Rick, in whose name it was executed.

The obligation upon which the money was payable was signed by A. G. Green, Joshua Keely, and Fannie Keely; it was a joint obligation; it secured the debt, not of any one, but of all the obligors together; the joint relation was voluntarily assumed, and each owed to the other the exercise of good faith for their joint interest. All the obligors were principal debtors; a confidential relation existed between them; each owed a duty to the other to disclose anything affecting the joint interest; and each represented the others in matters relating to the payment and discharge of their joint liability.

The deed to the building association was "under and subject" to the lien of the mortgage, and the conveyance in this form created a covenant on part of the grantee to indemnify the grantors against the mortgage debt: *Davis's Appeal*, 89 Pa. St. 272; *Taylor v. Mayer*, 93 Id. 42. If the association failed to pay, and the mortgagors discharged the debt, any one of them might receive the money on the indemnity and release the covenant.

Albert G. Green, being the counsel for Rick, had actual knowledge of the revocation of the deed, of the notice to Rick, of the proceedings in equity, and of the decree; he knew that the money was of right payable to Mrs. Peiffer; he was present in person when the money was paid by the building association, and was a party to the misapplication of it; it was his plain legal duty, for his own interest as well as for the protection of the others jointly bound with him in the bond, to disclose the facts which were peculiarly within his knowledge at the time of the payment. If he failed in the discharge of his duty in this respect, and either inadvertently or designedly permitted the money to be misapplied, his co-obligors must charge the consequences of this default to the party who made it. The reasonable rule of the law is, that one person is not to be prejudiced by the unauthorized acts and declarations of another; but there are exceptions to the rule, where there is a joint interest or liability between several voluntarily assumed; in such cases, each will be presumed to act and speak for the whole: *Clark v. Morrison*, 25 Pa. St. 453.

There is evidence also, notwithstanding the denial of the fact, from which the jury might well have found that the

building association knew that the bond was held in trust for Magdalena Peiffer; that fact was plainly noted on the back of the bond, which was then and there present, and actually passed into the hands of the association at the time; but there is no evidence that they had any knowledge of the revocation of the trust. The doctrine of *lis pendens*, we think, is not applicable in this case. The building association did not buy the bond and mortgage; they bought the land, and the title to the land was not in litigation. The bill in equity controverted the title to the bond and mortgage, and in buying the land the rightful ownership of the mortgage upon it was not involved; its existence was admitted, and the conveyance was under and subject to it.

The whole doctrine of *lis pendens* in this country is said to be founded upon the opinion of Chancellor Kent in *Murray v. Ballou*, 1 Johns. Ch. 566. The established rule, says the chancellor, is, that a *lis pendens*, duly prosecuted and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree, and the *lis pendens* begins from the service of the subpoena after the bill is filed. Where a purchase is made of property actually in litigation, *pendente lite*, upon a valuable consideration, and without express or implied notice, in point of fact the purchaser is affected in the same manner as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit: Story's Eq. Jur., sec. 405. The principle applies generally in suits brought in law or equity for the purpose of determining the title to real property: *Hersey v. Turbett*, 27 Pa. St. 418; but it is not confined to actions involving title to realty. It is applicable in certain cases involving the title to choses in action, excepting commercial paper not due. In *Diamond v. Lawrence Co.*, 37 Id. 353, it was held that the pendency of a suit between a county and a railroad company, in regard to bonds issued by the county in payment of its subscription to the stock of the company, is notice to all the world of the facts alleged in the pleadings therein. Also in *Murray v. Lylburn*, 2 Johns. Ch. 441, the principle was held to apply to choses in action, as well as to real estate, and to entitle a *cestui que trust*, whose land had been fraudulently disposed of by the trustee during the pendency of a suit brought against him, not merely to the land itself, but to the mortgages or other securities taken for the purchase-money, against purchasers or assignees claiming title thereto, as well as the assignments made whilst the suit was

pending. If, therefore, Rick had sold this bond and mortgage to the building association pending the proceedings on the bill in equity, the principle of *lis pendens* would apply without doubt; but we are not aware that the doctrine has ever been carried to cases where the party to be affected by it was not strictly a purchaser, *pendente lite*, of the property in litigation: See Wade on Notice, 360. In this case it was the land that was sold, not the mortgage, and it was the title to the latter only that was involved in the suit. There is another reason why *lis pendens* has no application here; those persons only are charged with notice or affected by *lis pendens* who purchase from parties to the suit: *Stuyvesant v. Hone*, 1 Sand. Ch. 419; *Parks v. Jackson*, 11 Wend. 442; 25 Am. Dec. 656; Wade on Notice, 369, and other cases there cited. The land was conveyed to the building association, not by Rick, but by the Keelys and Green, who were not parties to the suit.

The building association purchased the land subject to the mortgage, payment of which they assumed; they had a right to suppose, in the absence of any notice to the contrary, that the ownership of the mortgage was as it appeared upon the record; they paid the money in good faith upon this assumption; they were innocent of the injury to Mrs. Peiffer, and are entitled to protection. When one of two innocent persons must suffer loss by the default of a third person, if their rights are otherwise equal, that one should bear it who put it into the power of the defaulter to inflict the loss. As between Magdalena Peiffer and the building association, who would both appear to be innocent parties, the loss, if one must be borne, should therefore fall on Mrs. Peiffer who originally placed Rick in a position to inflict it. The pendency of the proceedings on the bill gave no notice, imposed no duty, and restricted no right which would subject the building association to the decree. In this condition of the case, the payment of the money discharged the mortgage, and the security it afforded was lost. But upon what grounds shall the plaintiffs be decreed the right to judgment against the defendants *is personam*?

As to the defendants in this case, who knew, or must be assumed to have known, of the revocation of this trust, there was no payment of this debt; payment to Rick was to them no payment at all. Although the mortgage may be discharged, the debt still remains, and the debtors by whose default the money miscarried are still liable for payment thereof. This

suit is on the bond, and we see no good reason why the judgment against the defendants should not be sustained. Where the lien of a mortgage is released or discharged, the debt which it was made to secure stands upon its own footing for the balance unpaid as if no mortgage had ever existed. But whether the mortgage was discharged in this case was sought to be ascertained on the trial on the bond; the building association voluntarily came into court and asked leave to defend *pro interesse suo*; an issue was framed as between the plaintiff and the building association involving the question of the good faith payment of the mortgage; defendants pleaded payment, and the entire matters at issue were submitted to the jury in the same trial. The verdict for plaintiff, although general in form, is equivalent to a verdict against the defendants for the amount of the bond, and against the building association, on the issue raised by the special pleas filed in their own behalf. We find no evidence which will justify the judgment against the building association on this issue. There is not the slightest evidence of notice on part of the association, nor is there any rule of law or of equity which, under the facts in this case, would restrict their rights to have this lien discharged.

The judgment entered against the building association is therefore reversed, but the judgment against Albert G. Green, Joshua Keely, and Fannie Keely, the defendants, is affirmed.

CO-SURETIES ARE FIDUCIARIES AND TRUSTEES FOR EACH OTHER, and are bound to observe the duties of that relation: *McPherson v. Talbott*, 10 Gill & J. 499; 32 Am. Dec. 191; *Taylor v. Morrison*, 26 Ala. 728; 62 Am. Dec. 747.

LAW OF LIS PENDENS, GENERALLY: See the note to *Newman v. Chapman*, 14 Am. Dec. 774-779. As to the modern modifications of the doctrine of *lis pendens*, see the note to *Mellorath v. Hollander*, 39 Am. Rep. 487, 488. In *Portis v. Hill*, 30 Tex. 529, 98 Am. Dec. 481, it is held that all persons purchasing realty pending suit are deemed to have notice of the claim until the final disposition of the suit.

PURCHASER FROM MORTGAGOR IS CHARGEABLE WITH NOTICE OF MORTGAGE DULY RECORDED: *Boutwell v. Steiner*, 84 Ala. 307; 5 Am. St. Rep. 375.

WEST BRANCH BOOM CO. v. LUMBER AND LAND CO.

[121 PENNSYLVANIA STATE, 142.]

CORPORATIONS. — BOOM COMPANIES ARE QUASI PUBLIC CORPORATIONS intended to supply facilities to the general public for the driving of logs.

ID. — CHARTERS OF MOST PRIVATE CORPORATIONS ARE FOR PURPOSE OF PRIVATE GAIN; but as they are intended also to subserve great public interests, they should be so construed as not to defeat the purpose of their creation.

ID. — GENERAL PRINCIPLE IN CONSTRUCTION OF STATUTES IS, that a proviso, or saving clause, which is directly repugnant to the body of the act, will not have effect to defeat the purpose of the enactment; but this principle will not apply in the construction of the charters of private corporations, where the matters contained in the saving clause are made and intended to be made an essential condition of the enjoyment of the charter. If private corporations accept charters under such circumstances, they must enjoy their privileges subject to the conditions, or not enjoy them at all.

ID. — THOUGH CHARTER OF PRIVATE CORPORATION IS TO BE STRICTLY CONSTRUED, yet when the commonwealth has granted a public franchise, a clause relative merely to the manner in which such franchise shall be exercised will not be construed so as to defeat the grant.

ID. — CONSTRUCTION TO BE GIVEN TO PROVISOS TO SECTIONS 2, 3, AND 7, act of March 29, 1849 (P. L. 245), incorporating the West Branch Boom Company, must not be such as to defeat the grant itself, forbidding the company to stop a mixed mass of logs for the shortest time reasonably necessary, by the use of the utmost diligence and skill, to withdraw from that mass their own logs. And if, in the exercise of their powers, they detain logs, and are in no way negligent, the special remedy provided by section 3 of the act must be pursued.

CASE by the Pennsylvania Joint Lumber and Land Company against the West Branch Boom Company, to recover damages for the detention of logs in the boom of the defendants, and for the resulting deterioration in their value. The material facts, and the statutory provisos considered and construed by the court, appear in the opinion. Verdict and judgment for the plaintiffs, and the defendants assigned error.

H. T. Harvey and Henry C. Parsons, for the plaintiffs in error.

H. C. McCormick and J. A. Beeber, for the defendants in error.

CLARK, J. By its charter the West Branch Boom Company was authorized to erect and maintain a boom on the south side of the west branch of the Susquehanna River near Lock Haven; and to this end to construct such piers, side branches, or shear-booms as might be necessary for stopping and securing logs or other lumber floating upon the river; and they are

required at all times to keep and maintain these piers and the booms sufficiently strong to secure all the lumber contained therein. The charter clearly contemplates the several distinct classes of lumber which, floating on the river, would come in contact with or be caught in the boom, and defines the duty of the company with respect to each.

1. It was provided that rafts of logs or other lumber might be landed and fastened as theretofore, and that any staved or broken raft coming into the boom should be delivered to the owner upon payment of a certain price in the nature of salvage.

2. That logs or other lumber might be driven into the boom for manufacture at Lock Haven, or to be formed into rafts, and transported upon the water in that form to the place of their destination below Lock Haven. This would seem to have been the first and principal object in view in the construction of the boom, as it is provided in the charter as follows: "It shall be the duty of the corporation to cause the passage-ways or open spaces to be carefully guarded day and night, so that no lumber be permitted to escape; to raft all lumber in said booms securely and faithfully, with suitable warps and wedges for rafting and securing the same below the said boom." The corporation had the right to charge and collect toll or boomage upon the lumber thus boomed, rafted, and secured, including warps, wedges, etc., at rates in the sixth section specified.

3. Other logs and lumber rafted in above Lock Haven, and destined for points below, and logs and other lumber not rafted, which were to be driven to their destination below Lock Haven. As to this there was a proviso or saving clause to the second section, as follows: "Provided that said booms shall not extend more than half-way across said river, and be so constructed as to admit the safe passage of rafts, boats, logs, masts, spars, or other lumber, and not impede the navigation of said river and the branches thereof"; also a like proviso, or saving clause, to the seventh section, as follows: "Provided at all times that no lumber of any description shall be stopped, except upon the written request of the owner or owners of the same, and no toll or expense shall accrue to any lumber designed to run or to be driven to any point below Lock Haven; a free and unobstructed passage shall at all times be kept open so that the navigation of the river shall be as free as it now is."

It is upon the proper construction of these saving clauses that the controversy arises. Plaintiffs' contention is, that as their logs were destined to points below the Lock Haven boom, and due and proper notice of that fact had been given, as required by the act of May 8, 1854 (P. L. 666), the defendants had no right to stop them, or to detain them, for any length of time in their boom, under any circumstances or for any purpose; and that, having done so in the years 1883 and 1884, they are answerable in damages for the loss occasioned thereby. The defendants maintain, however, that this construction of their charter would give it no practical effect whatever; that the several provisos mentioned, if so construed, are totally repugnant to the body of the act of incorporation, and would wholly defeat the public purpose which the legislature manifestly had in view in its enactment. Their contention is, therefore, that the saving clauses should receive such a reasonable construction as would not practically nullify their charter. They offered to prove, in substance, that the plaintiffs' logs, for the detention of which damages are claimed in this suit, were thrown into the river, or some of its tributaries, in the winter or spring of 1883 and 1884, to be driven into the Susquehanna boom, twenty-two miles below the West Branch boom; that at or about the same time a very large amount of other logs, perhaps two hundred million feet or more, some destined for the West Branch boom, and some for the Susquehanna boom, were thrown into the same stream indiscriminately, and that, when the spring freshets came, the whole mass of logs was driven down the stream; that the swollen stream was filled with logs from bank to bank, and as the "drive" approached the West Branch boom, it was absolutely impossible to ascertain to which boom the logs were destined; that they could only be known by inspection of the marks on the ends of the logs, of which there were over one hundred different kinds; that some of the logs were, in fact, destined for Lock Haven, and some for Williamsport, but that the marks could not be seen, nor their destination determined; that in order to secure the logs consigned to their custody, the West Branch Boom Company thereupon opened their boom, and received into it of the mass of the logs, without distinction, until their boom was filled, and suffered the residue to pass down the stream; that as soon as practicable, and with the utmost diligence and dispatch, they passed out of their boom all the plaintiffs' logs, and all other logs destined for

points below Lock Haven; that they used every appliance and means, expended large sums of money, employed a great many men, and did everything in their power, or that it was possible to do by human ingenuity and skill, to deliver the logs of the plaintiffs below their booms, so that they could be driven into the Susquehanna boom; that the marks are on the ends of the logs, and it is impossible to ascertain to whom the logs belong until the marks can be seen, and that can only be done when the boom is opened and the logs passed out.

Was this testimony admissible? Under the circumstances stated in the offer, had the defendants a right to detain the plaintiffs' logs until the marks upon them could be seen, and until they could be separated from logs which were consigned to their custody and care? Boom companies are organized to carry on, on a large scale, and under one management, the business of driving and rafting logs which would otherwise have to be done by individuals; they are intended to supply facilities for the driving of logs to the general public, and are therefore *quasi* public corporations: *Osborne v. Knife Falls Boom Co.*, 32 Minn. 412; 50 Am. Rep. 590; *Cohn v. Boom Co.*, 47 Wis. 314. "It is doubtless true," as we said in *Brown v. Susquehanna Boom Co.*, 169 Pa. St. 68, 58 Am. Rep. 708, "that such charters ought to be construed most beneficially for the public, and more strictly against the company; but the construction must be a reasonable one. The charters of most private corporations are for the purpose of private gain, and many of them grant exclusive privileges in abridgment of individual right; but as they are intended also to subserve great public interests, they should be so construed as not to defeat the purpose of their creation. The Susquehanna Boom Company was not only intended to serve the private interests of the corporation, but also that of the public, and especially of those who, with rafts, logs, or lumber, should navigate the stream; it purposed to do for them what they could in no way do for themselves. Whilst, therefore, the words of the charter should be construed with some degree of strictness for the public protection, they should not be construed to require the performance of what, in the nature of the case, cannot be performed."

It is a general principle in the construction of statutes that a proviso, or saving clause, which is directly repugnant to the body of the act, will not have effect to defeat the purpose of the enactment. This principle, it is true, will not apply in

the construction of the charters of private corporations, where the matters contained in the saving clause are made, and intended to be made, an essential condition of the enjoyment of the charter. If private corporations accept charters under such circumstances, they take them *cum onere*; they must enjoy their privileges subject to the conditions, or not enjoy them at all: *Dugan v. Bridge Co.*, 27 Pa. St. 309; 67 Am. Dec. 464. But even in such case, we must first be satisfied what the condition really is, and in case of ambiguity or doubt, the intent of the legislature, in this respect, must be ascertained from a consideration of the whole instrument. In the case just cited, although the building of the bridge may necessarily have involved the erection of piers, yet it was not shown that these piers could not have been erected in such place and in such a manner as not to injure the navigation. Besides, the condition was plainly expressed; it involved no ambiguity or repugnancy, either in the words of the statute or arising out of its practical operation.

In this case, however, the manifest purpose of the legislature was to authorize the West Branch Boom Company to stop all lumber marked for their boom. The defendants allege that to do this, and to comply with the provisions of the saving clause contained in the second and seventh sections, in any literal or strict sense, involves a practical and palpable absurdity, and that it is not probable the legislature intended the language of this proviso to be read in that sense. They contend that the saving clause to the seventh section, which provides that "no lumber of any description shall be stopped, except upon the written request," etc., does not apply to the mere temporary detention of the logs until the marks can be seen and their destination determined.

Private charters, as we have said, are to be strictly construed; but when the commonwealth grants a public franchise over a highway, a clause relative to the manner in which such franchise shall be exercised will not be construed so as to defeat the grant: *Whitaker v. Delaware etc. Canal Co.*, 87 Pa. St. 34. In the case cited, a corporation was authorized by its charter to construct a dam in a river, "provided that the same shall be so constructed as to leave the channel of said river as safe and convenient for the descent of rafts as it now is." "The plaintiff complains," says our late brother Trunkey, in the opinion of the court in that case, "that the river is not as safe and convenient for navigation as before

the erection of the dam. Unquestionably this is so. A dam in a stream is an impediment, and, in some degree, renders its navigation less safe and convenient. A literal construction of this provision makes it impossible to build and maintain the dam, and the conceded right vanishes. . . . Various statutes have been from time to time enacted authorizing public improvements, some of which would obstruct or impede the navigation of rivers, and others the use of streets and roads, which contained provisions forbidding such obstructions and impediments. The courts have uniformly held that these provisions should be liberally construed, so as not to destroy the grant." In support of this principle are cited *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112; 84 Am. Dec. 527; and *Commonwealth v. Erie etc. R. R. Co.*, 27 Pa. St. 365; 67 Am. Dec. 471. In the former case, the charter of the company provided that nothing therein contained should authorize the erection of a bridge over the Monongahela River "in such manner as to injure, stop, or interrupt the navigation of the river by boats, rafts, or other vessels." It was held that the proviso was not intended to prevent the erection of piers in the bed of the river. Although piers in the bed of a navigable stream inevitably injure navigation, and render it more difficult, they do not necessarily "injure, stop, or interrupt the navigation," in the sense in which these words were used by the legislature. A strict, literal meaning was not intended, and, in the very nature of the case, it never could have been. When the purpose of the franchise is the performance of a public act, the grant is to be so interpreted as to enable the act to be done. "The general rule," says Mr. Justice Read, "undoubtedly is, that charters of incorporation of private companies are to be construed strictly in favor of the commonwealth,—so are grants to any persons,—but they are to be construed reasonably. It is very clear that when the purpose of the franchise is the performance of a public act, the grant is to be interpreted so as to enable the act to be done. The act for the provision so made in this charter was a public one. It was the extension of one highway over another. Nor was the erection of the bridge less the performance of a public function because the agent was empowered to exact tolls from passengers. The legislature is not to be supposed to have authorized and prohibited such a public act at the same time and by the same charter; a grant of power to erect a public bridge is not to be construed so as to make its erection

impossible, and such a construction justified by the rule that private charters are to be strictly interpreted." In the case of *Commonwealth v. Erie etc. R. R. Co.*, 27 Pa. St. 365, the charter of the railroad company had a provision in it that the railroad "should be so constructed as not to impede or obstruct the free use of any public road, street, lane, or bridge now laid out, open, or built." Chief Justice Black, in the opinion of the court rendered in that case, says: "And another objection to this location is more grave, because it bases itself on a provision in the act of incorporation. It is said that the streets would be less obstructed by taking the road down to the harbor than by locating it where the defendants propose. The company is forbidden to make the road so as to obstruct or impede the free use of any street. These words, taken literally and in their strongest sense, would prevent the railroad from being made on the streets at all. But we followed authority in saying they were not to be so interpreted."

But the rule of construction applicable here would seem to have been settled by the judgment of this court in the unreported case of *Susquehanna Boom Co. v. West Branch Boom Co.*, argued at the January term, 1877. The proviso to the second section, as we have said, provides "that the said booms shall not extend more than half-way across the river, and be so constructed as to admit the safe passage of rafts, boats, logs, masts, spars, or other lumber, and not impede the navigation of said river and branches thereof." Whilst the permanent portion of the boom structures was on the south side, and did not extend more than half-way across the stream, yet the company swung the shear from the north side of the river, and when the shear was closed the entire stream was for the time obstructed. The Susquehanna Boom Company thereupon filed a bill in equity in this court, praying that the West Branch Boom Company might be enjoined from maintaining the shear; on full consideration, however, the bill was dismissed. Our brother Gordon, in delivering the opinion of the court, said: "Whether the defendant has the right to the use of the shear by which, at least occasionally and for a short time, logs intended for the Susquehanna boom must be stopped, depends altogether upon the powers conferred upon it by its charter; beyond this it cannot go; it must abide by what is written therein, or what arises therefrom by necessary implication. . . . A literal construction of this proviso utterly defeats the grant, for, as we have seen, the boom without a

shear, and that from the north side, is worthless; but more than this, if the boom itself must be so constructed as to allow the passage of boats, rafts, and lumber through it, it is wholly worthless, since in that case it would hold nothing. This, however, will not do, for a proviso in a grant for a public franchise cannot be allowed to defeat the grant itself: *Whitaker v. Delaware etc. Canal Co.*, 87 Pa. St. 34. . . . We are brought to the conclusion, which, after much examination and thought, we regard as inevitable, that the defendant had the right under its charter to maintain and use the shear which it did have and use at the time of the filing of this bill. Without such a structure the franchise itself is valueless; neither can the corporation answer the purposes of its creation nor perform the duties imposed upon it by the act of incorporation. It must therefore have its shear booms, and of course it must use them in accordance with the terms of the statute. The act has made ample provision for a free and unobstructed navigation, and for the earliest possible transmission of lumber necessarily lodged within the booms, and if in this or any other particular the defendant neglects or fails to perform its duty, it is answerable for any damages arising from such neglect or failure."

These cases show conclusively that we are not to adhere strictly to a literal construction of this charter, if by so doing we defeat the public purpose to be subserved thereby; the provisos are to be construed so as not to defeat the grant itself. The swinging of the boom from the north side assumes the power of the corporation for some purposes over the whole width of the river; and the right to use the shear, and to stop their own logs driven indiscriminately with the logs of others, assumes the right, under the circumstances stated in the offer, to stop the mixed mass of logs for the shortest time reasonably necessary, by the use of the utmost diligence and skill, to withdraw from that mass their own logs. To decide otherwise would be to defeat the very purpose which the legislature had in view.

That this was the actual legislative intent, however, is manifest upon a careful reading of the proviso to section 7. It is provided that "no lumber of any description shall be stopped, except upon the written request of the owner or owners of the same." Now, it is plain that the stopping referred to here is not a mere temporary interruption of the progress of the logs for the purpose mentioned, but a stopping

of the logs as at the place of their destination, at the request of the owner. Further, it is provided "that no toll or expense shall accrue to any lumber designed to run or to be driven to any point below Lock Haven." If it was contemplated that such lumber was not under any circumstances to be stopped in the West Branch boom, how could any toll or expense accrue upon it? Assuming, however, that this class of lumber might and probably would at times come within the inclosure of this boom, it was reasonable and proper, conceding the right to interrupt its passage temporarily, and for a lawful purpose, to make provision that there should be no toll or expense charged for turning it out.

But it is said that the identical question now under discussion was decided otherwise in *West Branch Boom Co. v. Dodge*, 81 Pa. St. 285. What the precise facts in that case were does not appear. It was an action on the case for the detention of a quantity of saw-logs which ran into the defendants' boom in the spring of 1852. The jury found a verdict for the plaintiffs, by consent, subject to the opinion of the court whether in law the plaintiffs were entitled to recover. Under what circumstances, for what purpose, or for what length of time, the logs were detained does not appear in the report of the case. The opinion may or may not be in conflict with the views here expressed; that depends wholly upon the facts upon which it is based. There are some general expressions contained in it which might appear to be in conflict, not only with the rulings in this case, but with *Susquehanna Boom Co. v. West Branch Boom Co.*,—case not reported,—already referred to. These expressions, however, may be made with reference to a state of facts wholly different from the facts in this case or in the case mentioned. However this may be, we are well satisfied that the construction we have given to this charter is the reasonable and proper one, and that it is in conformity with the rule now recognized in this state.

If the facts set forth in the offer are established by the proofs, it follows that the defendants, in stopping the plaintiffs' logs, under the circumstances and for the purposes stated, were exercising powers conferred by their charter, and for any negligent performance of these powers would be answerable only according to the provisions of the charter: *Bald Eagle Boom Co. v. Sanderson*, 81 Pa. St. 402.

The judgment is reversed, and a *venire facias de novo* awarded.

QUASI CORPORATIONS, GENERALLY: See the note to *Todd v. Birdsell*, 13 Am. Dec. 523-525.

CHARTERS OF PRIVATE CORPORATIONS ARE GENERALLY TO BE STRICTLY CONSTRUED: See *Mobile v. St. Louis etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342, and note.

PROVISO OR SAVING CLAUSE IN STATUTE IS NOT TO HAVE EFFECT when repugnant to the purview of the body of the act; but this rule does not apply to acts constituting private corporations: *Dugan v. Bridge Co.*, 27 Pa. St. 303; 67 Am. Dec. 464.

LIBERAL RULES OF CONSTRUCTION SHOULD BE ADOPTED IN EXPOUNDING CHARTER conferring privileges and exemptions, where the enterprise is greatly for the benefit of the community: *Mayor etc. v. Baltimore etc. R. R. Co.*, 6 Gill, 288; 48 Am. Dec. 531; see also *Bardstown etc. R. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199; 81 Am. Dec. 541.

TIFFANY v. COMMONWEALTH.

[121 PENNSYLVANIA STATE, 165.]

CRIMINAL LAW. — PRESUMPTION THAT KILLING, SHOWN TO BE UNLAWFUL, IS MURDER, may be rebutted, or so far weakened by other evidence in connection with the legal presumption of innocence as to create a reasonable, substantial doubt as to the guilt of the accused or the grade of the crime charged, and thus entitle him to an acquittal or to a reduction of the grade.

MALICE IS ESSENTIAL INGREDIENT OF MURDER, either of the first or second degree, and while its existence may be presumed from certain proved or admitted facts, the presumption is not necessarily conclusive. There may be rebutting evidence for the consideration of the jury.

IN CRIMINAL CASES, BURDEN OF PROOF NEVER SHIFTS, BUT RESTS on the prosecution throughout, so that in all cases a conviction can be had only after the jury have been convinced, beyond a reasonable doubt, of the defendant's guilt. It results that if from any or from all the evidence taken together a reasonable doubt of guilt is raised, there should be an acquittal.

ERRONEOUS CHARGE AND ERRONEOUS REFUSAL TO CHARGE. —On a trial for murder, where there was evidence of an attack made upon the defendant so violent as to warrant him in believing that he was in danger of great bodily harm or loss of life unless he used a pistol in defending himself, a charge that "if the facts and circumstances are in evidence, no matter by whom produced, which make the extenuation that reduces the grade of the crime, they have the effect to reduce it, but those facts and circumstances must be more than sufficient to raise a reasonable doubt," is misleading and erroneous; and it is error, in such case, to refuse to charge that if the circumstances in evidence raised a reasonable doubt of murder in the second degree, they would operate to acquit of it.

SELF-DEFENSE. — OWNER OF LAND HAS RIGHT TO ORDER TRESPASSER THEREFROM, but he has no right to follow him up until an attack is made upon himself so fierce as to compel him to take the life of the trespasser in self-defense.

WHERE, ON TRIAL FOR MURDER, THERE IS EVIDENCE TENDING TO SHOW that the defendant was assaulted by the deceased and another, and that he killed the deceased in self-defense, evidence to prove the bad reputation of such other person as a violent and dangerous man, and that all this was known to the defendant at the time of the homicide, is admissible, as directly bearing on the question of justifiable self-defense.

INDICTMENT for murder. Verdict that the defendant was guilty of murder in the second degree. The material facts appear in the opinion.

E. L. Blakeslee, A. H. McCollum, and George A. Post, for the plaintiff in error.

F. L. Lott, district attorney, and Cornelius Smith, for the defendant in error.

STERRETT, J. The clear and comprehensive charge of the learned president of the oyer and terminer contains a correct exposition of the law applicable to the several degrees of homicide upon which the jury were required to pass, except in his refusal to charge, substantially, as requested by the prisoner, that a reasonable doubt as to the existence of malice was sufficient to reduce the grade of homicide below murder of the second degree. His refusal to so instruct the jury is practically the subject of complaint in the first four specifications of error.

While it was not denied that the deceased, Samuel Hocum, died from the effect of a pistol-shot wound inflicted by the prisoner, it was contended that the shooting was done in justifiable self-defense, or, at the very utmost, under such legal provocation as stripped the act of malice and reduced the grade of offense to manslaughter. Considerable evidence was introduced for the purpose of showing that the prisoner was assaulted on his own premises by deceased and his companion, Lafayette Crandall; that the attack was so fierce and violent as to warrant him in believing he was in danger of great bodily harm or loss of life unless he used the pistol in defending himself. Without referring fully to the evidence, it is sufficient to say that it tended to sustain his contention, and presented a proper case for submission to the jury on questions of fact involved therein.

Among other things, the prisoner himself testified: "I went to my lot to pick berries, . . . and while I was there, busy picking berries, Crandall and Hocum came where I was, and I said, 'How do you do?' pleasantly, and they responded, and

I saw they had been drinking. Hocum said, 'Why don't you let Steve alone? Why do you meddle with his distillery?' And I said, 'That is my business'; and Hocum said, 'We'll make it ours. If you don't stop informing against him, we'll fix you in a way that you will wish you never had.' I said, 'Gentlemen, get off from my premises. I will not be abused on my own land. You shall not pick berries here.' And Crandall said, 'Lick him, Sam. You can do it without any help. I will go and sit down and see the fun.' And Crandall started away slowly, and Hocum called me names.

"Q. What did he call you? A. He called me a liar. He said I was a liar.

"Q. What else? A. Well, he used some hard language. I would not be able to tell exactly, perhaps. I told him to go off, and at that he stuck his hand in my face. I stepped away. We walked slowly down the hill. He halted to stick his hands in my face. I told him I did n't want any quarrel; that I had never struck a man in my life. Then he struck me in the stomach and on the right cheek. I told him to let me alone. If he wanted to quarrel he could have his drunken quarrels with his son-in-law, as he had the other night, when he got his face marked. He picked up a stone and struck me in the left side, stunning me. He had another stone, and says, 'I will smash your brains out, you son of a bitch'; and just then I saw Crandall running. He threwed his pail, and was running with all his might, with his fist doubled up, straight towards me, and I was scared, and I halloed, 'Help!' and Hocum said, 'I will help you with a bullet'; and Crandall says, 'Shoot him, Sam, shoot him.' Hocum had a stone in his hand, and put his other hand toward his hip-pocket, and stepped towards me. I had heard that they were desperate characters, and quarreled among themselves, and threatened to shoot each other, and threatened to kill each other, and I suddenly thought of my revolver, and I jerked it out, and I was so excited and scared that I hardly realized when the revolver went off. Just then Crandall had hold of me and jerked me down, and had one hand on my throat and the other on the revolver, and then I heard a voice say, 'Keep the revolver, Lafe,' and he let go of my hand and I got away. I can hardly tell how I got home," etc.

The prisoner's narrative of the occurrence bears the impress of candor and truthfulness; and while it is contradicted in

some essential particulars by Crandall and other witnesses for the commonwealth, it is corroborated to some extent by other evidence showing his condition after the shooting,—great prostration, marks of blows on his face and left side, where he testified he was struck by Hocum, etc. These and other corroborating facts and circumstances had an important bearing on the question of veracity between him and witnesses for the commonwealth.

In view of the evidence relied on by the prisoner, the court was requested to charge as to the legal effect of the facts the jury might find therefrom, and especially of a reasonable doubt as to the existence of malice at the time the fatal shot was fired. In that portion of his charge recited in the third specification, the learned judge, after reminding the jury that he had “refused to affirm two of the prisoner’s points with reference to the crime of murder in the second degree,” said: “I refuse to say, as requested in those points, that if the circumstances in evidence, put there either by the prisoner or the commonwealth, raised a reasonable doubt of that crime, that those facts and circumstances would operate to acquit of it.” Again: “If the facts and circumstances are in evidence, no matter by whom produced, which make the extenuation that reduces it [grade of the crime], they have the effect to reduce it, but those facts and circumstances must be more than sufficient to raise a reasonable doubt.” This was misleading and erroneous; and the error is not cured by what he said in immediate connection with the first quoted sentence.

It is undoubtedly true that “where a homicide is committed, and the killing is shown to be unlawful, it is presumed to be murder”; but this presumption may be rebutted, or so far weakened by other evidence in connection with the legal presumption of innocence as to create a reasonable, substantial doubt as to the guilt of the accused or the grade of the crime charged, and thus entitle him to acquittal or reduction of the grade. In other words, it is not a presumption *juris et de jure*,—an irrebutable presumption. Malice, for example, is an essential ingredient of murder, either of the first or second degree; and while its existence may be presumed from certain proved or admitted facts, the presumption is not necessarily conclusive. There may be rebutting evidence for the consideration of the jury. It is incumbent on the commonwealth, in every such case, to establish the existence of malice, express or implied, not merely by a preponderance of evidence,

but by proof beyond a reasonable doubt. In *Turner v. Commonwealth*, 86 Pa. St. 54, 74, 27 Am. Rep. 683, the present chief justice said: "We are inclined to think, with Mr. Greenleaf, 1 Greenl. Ev., sec. 81 b, that the true rule in criminal cases, notwithstanding some decisions to the contrary, is, that the burden of proof never shifts, but rests on the prosecution throughout, so that in all cases a conviction can be had only after the jury have been convinced, beyond a reasonable doubt, of the defendant's guilt. From this it results that if from any or from all the evidence taken together a reasonable doubt of defendant's guilt is raised, there should be an acquittal."

Whatever doubt there may be as to the applicability of the principle thus stated to cases where the prisoner relies on some distinct, substantive ground of defense, not necessarily connected with the transaction on which the indictment is founded, such as insanity, etc., there can be no question as to its soundness as well as applicability to cases where, instead of setting up such separate and independent fact in answer to a criminal charge, the accused confines his defense to the original transaction charged as criminal, with its accompanying circumstances. In the latter, the burden of proof never changes, but remains on the commonwealth to satisfy the jury that the act was unlawful and unjustifiable, and if the crime be a graded one, that it is of the grade claimed by the commonwealth.

Numerous authorities might be cited in support of this view, among which are Wharton's Criminal Evidence, 236; *Commonwealth v. Hawkins*, 69 Mass. 463; *Maher v. People*, 10 Mich. 212; 81 Am. Dec. 781; *Lillienthal v. United States*, 97 U. S. 266. In the latter it is said: "In criminal cases the true rule is, that the burden of proof never shifts; that in all cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt, of the affirmative of the issue presented in the accusation, that the defendant is guilty in manner and form as charged in the indictment. . . . Where the matter of excuse or justification of the offense charged grows out of the original transaction, the defendant is not driven to the necessity of establishing the matter in excuse or justification by a preponderance of evidence, and much less beyond a reasonable doubt. If, upon a consideration of all the evidence, there be a reasonable doubt of the guilt of the party, the jury are to give him the benefit of such doubt": *Tweedy v. State*, 5 Iowa, 433. The same thought is thus presented by Mr. Wharton in his admirable work on evi-

dence, above referred to: "Provocation, also, as a defense, which goes to negative premeditation and malice, must be regarded as traversing the essential ingredients of all offenses which require proof of premeditation and malice. Hence, according to the distinction just stated, the burden is on the defendant to prove provocation in all cases where he opens this defense; yet when the evidence on both sides is closed, he is entitled to an acquittal if he has offered proof enough to cast a reasonable doubt on the averments of malice and premeditation, when thus essential."

The fifth specification is not sustained. As a whole, the point recited therein is not correct as a legal proposition, and hence there was no error in refusing to affirm it. While the prisoner had a right to order deceased and his companion off the premises, etc., he had no right to follow them "up until an attack was made upon him so fierce as to put him on self-defense."

The subject of complaint in the sixth specification is the rejection of the offer to prove by the witness then on the stand, and twenty-five other witnesses, "that Lafayette Crandall has a notoriously bad reputation as to being a quarrelsome, bad-tempered, dangerous man, and that all this was known to Judson Tiffany on the 15th of July, 1886, at the time of the shooting." For obvious reasons, that evidence should have been received. According to defendant's own evidence, as we have seen, he was assaulted by both Hocum and Crandall, and he had as much right to prove the bad reputation of the latter as a violent and dangerous man as he would have had to prove the reputation of Hocum. It had a direct bearing on the question of justifiable self-defense.

The remaining specifications are not sustained. There is nothing in either of them that calls for special notice.

Judgment reversed, and a *venire facias de novo* awarded.

MALICE IS IMPLIED FROM EVERY DELIBERATE AND INTENTIONAL HOMICIDE, when not accompanied by circumstances of extenuation or explanation: *State v. Shippey*, 10 Minn. 223; 88 Am. Dec. 70, and note 74; *State v. Moore*, 25 Iowa, 128; 95 Am. Dec. 776.

SUFFICIENCY OF EVIDENCE TO ESTABLISH MALICE IN CASE OF HOMICIDE is determined, as any other fact, by its effect to reasonably satisfy the mind: *McCoy v. State*, 25 Tex. 33; 78 Am. Dec. 520.

BURDEN OF PROVING OFFENSE IN CRIMINAL CASE beyond a reasonable doubt is upon the prosecution: *Billard v. State*, 30 Tex. 367; 94 Am. Dec. 317, and note; *State v. Hossie*, 15 R. I. 1; 2 Am. St. Rep. 638.

WHERE ONE HAS REASONABLE AND WELL-GROUNDED BELIEF that he is actually in danger of losing his life or suffering great bodily harm, he is justified in defending himself to the extent of killing his assailant: *Tillery v. State*, 24 Tex. App. 251; 5 Am. St. Rep. 682, and note.

IF EVIDENCE ON PRISONER'S BEHALF RAISES REASONABLE DOUBT OF HIS GUILT, he must be acquitted: *French v. State*, 12 Ind. 670; 74 Am. Dec. 223.

TRESPASS IS NOT SUCH PROVOCATION AS ENTITLES ONE TO USE DEADLY WEAPON, or reduces killing below murder: *State v. Shippey*, 10 Minn. 223; 88 Am. Dec. 70, and note.

EVIDENCE OF BAD CHARACTER OF DECEASED FOR TURBULENCE AND VIOLENCE is admissible only to show accused's belief of imminent peril, to establish justifiable homicide: *Lang v. State*, 84 Ala. 1; 5 Am. St. Rep. 324, and note.

MIFFLIN'S APPEAL.

[121 PENNSYLVANIA STATE, 265.]

WILLS — PERPETUITIES. — WHERE, BY TERMS OF DEED OF TRUST, ESTATE IS LIMITED TO GRANTEE FOR LIFE, with a general power of appointment by will, with full power also to convey in fee or by mortgage, the latter power, though not exercised, renders the life estate destructible by the grantee in his lifetime; and so far as the application of the rule against perpetuities to the power of appointment by will is concerned, the estate of the grantee is to be regarded as though it were an estate in fee.

INDESTRUCTIBILITY OF ESTATE OF PERSON WHO, FOR TIME BEING, IS ENTITLED to the property subject to the future limitation, is an essential element in the definition of a perpetuity. An estate which can be destroyed by the person who holds it for the time being is not indestructible.

BILL in equity filed by William Mifflin against James Mifflin, substituted trustee under the will of Sarah L. Mifflin, J. Sergeant Price, trustee under the will of James L. Mifflin, Theresa W. Mifflin, James Mifflin, Dorothea T. Frohock, widow, formerly Mifflin, and Thomas Mifflin, for a partition and account. By deeds dated June 9, 1813, and March 19, 1816, respectively, Sarah L. Mifflin took an estate for life in the premises in controversy, with a general power of appointment by deed or will, and also full power to convey in fee or by mortgage. She never exercised the powers of sale contained in these deeds; but by will dated June 23, 1855, devised the land to her children for life, with power to appoint the same by any instrument in the nature of a will, with remainder to their children. She died December 7, 1856, leaving to survive her seven children, all of whom, except the complainant, died before the filing of this bill, all the parties to which

claimed under her will. The question to be determined was, whether the exercise by Mrs. Mifflin of the power of appointment conferred by the deeds was valid in favor of the grandchildren who claimed under it, or failed as tending to a perpetuity, because they might have been, as some of them actually were, born after the delivery of the deeds. And the complainant was not born until between six and seven years after the deed first above mentioned was executed. The master found, in his conclusions of law, that the limitations in Mrs. Mifflin's will, so far as they related to property included in the deeds mentioned, were invalid, inasmuch as they caused those instruments to offend against the rule forbidding perpetuities; that Mrs. Mifflin was to be considered as having died without exercising her power of appointing by will, so far as these properties were concerned; and that her children therefore took remainders in fee which were not directed by her will, but which passed by their wills, if any, or if none, under the intestate laws. The court below reversed the master, arriving at a conclusion favorable to the defendants; holding that, in whatever words an estate is conferred, and although it be only for life, it cannot be a perpetuity if the holder is clothed with power that will enable him to set aside the limitations imposed by the original grantor, and confer an absolute interest on himself or on another person. The complainant appealed.

A. T. Freedley, William Henry Rawls, and R. Mason Lyle, for the appellant.

J. B. Townsend and George W. Biddle, for the appellees.

GREEN, J. If the element of indestructibility of the estate of the person who, for the time being, is entitled to the property subject to the future limitation is an essential in the definition of a perpetuity, the decision of the court below is right. In at least two instances this court has approved a definition which does include that element. Thus in *Hillyard v. Miller*, 10 Pa. St. 334, Chief Justice Gibson said: "A perfect definition of a perpetuity has not been given, and the nearest approach to it is found in Lewis on Perpetuities, chapter 12, where it is said to be a future limitation, whether executory or by way of remainder, and of real or personal property, which is not to vest till after the expiration of, or which will not necessarily vest within, the period prescribed by law for

the creation of future estates, and which is not destructible by the person for the time being entitled to the property subject to the future limitation, except with the concurrence of the person interested in the contingent event." The same judge in the same opinion said: "It was the indestructibility, not only of springing and shifting cases [uses?] and of executory devises, but also of future trusts, which forced upon the judges the rule against perpetuities, in order to set bounds to the remoteness of not only legal but equitable limitations; and it acts upon perpetuities wherever they appear, except in conveyances in mortmain or to charitable uses." In *Smith's Appeal*, 88 Pa. St. 495, the foregoing extract containing the definition by Lewis was repeated by our brother Paxson in the course of the opinion, which was delivered by him.

In the definition given by other text-writers, the same idea is expressed. Gray, in his work on the rule against perpetuities, in sections 140 and those which follow, clearly points out that a perpetuity is an indestructible and inalienable interest in its original sense; and while he shows that it has another or artificial meaning, to wit, that "it is an interest which will not vest till a remote period," yet in all his illustrations he shows that interests which were destructible were not perpetuities. At section 203 he says: "Thus a future interest, if destructible at the mere pleasure of the present owner of the property, is not regarded as an interest at all, and the rule does not concern itself with it. For instance, limitations after an estate-tail are never too remote; the present tenant in tail can destroy them all at any moment by docking the entail." Again, at section 443, he says: "A future estate which at all times until it vests is in the control of the owner of the preceding estate is, for every purpose of conveyancing, a present estate, and is therefore not obnoxious to the rule against perpetuities." Under the head of powers, at section 477, he says: "A power given to the unborn child of a living person is too remote; that is, if it is a power to be exercised by will only, or a special power to be exercised by deed. But if such unborn child has a general power to appoint by deed, he has the absolute control exactly as if he had the fee, since he can at once appoint to himself. Such general power to appoint by deed is therefore not obnoxious to the rule against perpetuities"; citing *Bray v. Hammersley*, 3 Sim. 513. Again, at section 524: "If property is given to A for life, with power to appoint it by deed or will to whom he pleases, he has the ab-

absolute control over it. There is, in truth, no future interest; the life tenant can deal with the property as if he owned it in fee. Therefore, in the execution of such a power, the remoteness of an appointment under it is to be judged from the point of time of its exercise, and not from the time of its creation"; citing a number of authorities.

Mr. Lewis, in his work on perpetuities, on page 483, says: "The great aim of the law against remoteness is secured in the immediate and unrestrained alienability of the property by means of the power." Farwell on Powers, page 226, says: "The rules against perpetuities apply to instruments executing powers as well as to other instruments; but there is an important distinction between general and particular powers in this respect. The donee of a general power is virtually the absolute owner of the property on which his power extends, and he is regarded as absolute owner for the purpose of considering the application of the rule against perpetuities to him." In Gray's work, at section 526 b, the author says: "And if a man who has a vested limited interest in property has the present unconditioned right to turn that limited interest into an absolute interest, and thus to acquire the present unconditioned absolute interest, he is regarded by the rule against perpetuities as already having such interest. A tenant in tail is such a person; a life tenant with a general power exercisable by deed is also such a person. To this extent the rule sacrifices form to substance, but the substance must be there. There must be a person with a vested limited interest who has the immediate right to become the present absolute owner. Such is not the case when a life tenant has a power which he can exercise only by will. The general rule must govern unless the exception is made out, and the exception is not made out unless there be a present right to acquire the present absolute interest."

In Lewis on Perpetuities, at page 484, the author, speaking of general powers, says: "Of this kind is a limitation of property to such uses or upon such trusts as A shall appoint, and subject to any appointment to A in fee, or to B in fee, or to any other person or succession of persons for life, in tail, in fee, or otherwise. In such cases, as the power is so general and absolute as to be equivalent, for the purposes of alienation, to the ownership in fee-simple, an appointment under it, so far as concerns the proper period for the vesting of the interests thereby conferred, rests on the same footing with an original

conveyance. Nor is there any greater tendency to a perpetuity in a general power of appointment over property, and the possibility of the exercise of such power in opposition to the laws of remoteness, than in a simple absolute right of ownership. The general power authorizes as complete and as immediate a disposition of the property as could be effected were the donee entitled to the fee or absolute interest; and it is of course clear that such a power may be exercised by the donee in favor of himself. And, as regards the estate limited in default of appointment, when not given to the donee of the power, there can be no necessity to consider how far a perpetuity may be created; because although that estate may be defeated at any time by an exercise of the power, yet the great aim of the laws against remoteness is secured in the immediate and unrestrained alienability of the property by means of the power. It may be true that any alienation of the property must be merely and simply by virtue of the power, and that the exercise of such power must take effect by reference to the deed or will creating it, and so far a necessity may seem to exist for restricting the donee to the appointment of interests which would have been good if limited in the original will or settlement; but if the essence of a perpetuity be wanting in the nature of the power, or rather if the scope and spirit of the power be directly adverse to a perpetuity, it seems too much to argue that it will not authorize limitations which might have been created by a person having the absolute dominion, i. e., such limitations as will necessarily vest within lives in being and twenty-one years, computed from the time at which they are raised."

The foregoing views are undoubtedly correct; they are not at all impeached by text-writers or decisions. In our opinion, they control this case. As a matter of course, if Mrs. Mifflin had actually executed the power of sale, and caused the title to be conveyed to herself in fee-simple, as she had the plain right to do, the limitations of her will would have to be determined upon their own merits, regarding her as the owner in fee, and disregarding the previous state of the title. But so far as the application of the rule against perpetuities is concerned, the situation is precisely the same as if she had executed the power. For the question is, whether the provisions of the original deeds of 1813 and 1816 are inoperative because of the rule against perpetuities. They are, if they create inalienable and indestructible estates, to continue longer than

the prohibited period. But the estate of Mrs. Mifflin was neither inalienable nor indestructible. It was destructible by her own act. It was entirely within her power to become the owner in fee-simple of the estates granted, and to totally defeat any ulterior limitations. It proves nothing to say she did not exercise her power, and that therefore the situation is the same as though she never had the power. For certain purposes and in certain cases that, of course, is true. But in considering merely the application of the rule against perpetuities, it is not true, because that rule requires that the estates in question should be indestructible, and an estate which can be destroyed by the person who holds it for the time being is not indestructible.

We do not think it necessary to follow the learned counsel on both sides through the very able and interesting discussions contained in their paper books. We will say, however, that *Smith's Appeal*, 88 Pa. St. 492, does not control this case. Mrs. Smith had only a limited power of appointment by will, which, of course, could only operate after her death. She could in no manner acquire the title herself, and her estate was an indestructible one, whereas Mrs. Mifflin's estate was destructible beyond all question. In our opinion, the learned court below was right in the view taken of Mrs. Mifflin's estate, and therefore the decree is affirmed, and appeal dismissed, at the costs of the appellant.

PERPETUITIES WHICH ARE FORBIDDEN IN THE UNITED STATES: See note to *Barnum v. Barnum*, 90 Am. Dec. 101-106; see also *Ford v. Ford*, 70 Wis. 19; 5 Am. St. Rep. 117.

BELL v. MAHN.

[121 PENNSYLVANIA STATE, 225.]

STATUTES — CONSTRUCTION. — PERFORMANCE OF OPERA IS THEATRICAL EXHIBITION, within the meaning of Pennsylvania act of April 16, 1845, and other subsequent acts, providing that no "theatrical exhibition" shall be allowed in this state without a license first obtained, fixing the price of such license, and providing for the manner in which it may be obtained.

CASE stated, wherein Frank F. Bell, treasurer of the city of Philadelphia, to the use of the commonwealth of Pennsylvania, was plaintiff, seeking to recover of H. B. Mahn, defendant, for a license to give operatic exhibitions in the county of Phila-

delphia. The plaintiff based his case upon the act of April 16, 1845 (P. L. 533), providing: "Section 2. That no theatrical exhibition or exhibitions of circus performances or menageries shall hereafter be allowed in this commonwealth without a license from the state; and the treasurer of any county shall have authority to grant licenses, under his hand, and seal of the proper county, for such exhibition, on the payment of the following sums," naming them. Judgment was ordered to be entered in favor of the defendant, and the plaintiff assigned error.

Joseph L. Caven and J. B. Anderson, for the plaintiff in error.

John Dolman, for the defendant in error.

CLARK, J. Although the facts are somewhat meagerly presented in the case stated, the single question sought to be raised for the determination of this court is, whether or not the performance of an opera may be properly regarded as a theatrical exhibition within the meaning of the act of April 16, 1845 (P. L. 533), and other acts of assembly subsequent thereto, providing that no "theatrical exhibition" shall be allowed in this state without a license first had and obtained, fixing the price of such license, and providing for the manner in which it may be obtained.

A theater among the ancients was an edifice in which spectacles or shows were exhibited for the amusement of the spectators; but in modern times a theater is a house for the exhibition of dramatic performances; a theatrical exhibition must be either such as pertains to a theater or to the drama, for the representation of which the theater is designed: Webster. A drama is a story represented by action; the representation is as if the real persons were introduced and employed in the action itself. It is ordinarily designed to be spoken; but it may be represented in pantomime, when the actors use gesticulation, sometimes in the form of a ballet, but do not speak; or in opera, where music takes the place of poetry and of ordinary speech, and the dramatic treatment is essentially different from either. An opera is defined to be a musical drama, consisting of airs, choruses, recitations, etc., enriched with magnificent scenery, machinery, and other decorations, and representing some passionate action: Webster. The spoken drama, therefore, and the opera agree in the

method or manner which is essential to the dramatic art, viz., imitation in the way of action. In the former, it is true, the actor observes the rules of rhetoric and of oratory, and follows the special laws of dramatic delivery; whilst in the latter he employs the power of music, both vocal and instrumental, as a medium of artistic and passionate expression,—music, however, which is not arranged with reference mainly to its melodic interest, but in such form as to express, not only the words, but the thoughts, emotions, and passions of the mind, such as joy, grief, hope, despair, etc., which the idea or conception of the play may involve. The word-setting, the orchestration, the musical intervals, and the composition generally, are all arranged to serve the exigency of the passing sentiment, and to turn the subject of the story into the action of the play; in short, the opera is composed with special reference to the declamatory power of music.

It is contended, on part of the defendant, that the essential element of the opera is music, and of the drama, plot and action, dialogue and declamation; that the music of a modern opera is not simply an accessory to the play; that the libretto is but a peg on which to hang the music; that an opera is essentially a musical work, and its performance cannot be called a dramatic representation, and in that sense a theatrical exhibition. A quotation from Zell's *Encyclopædia* to this effect is given in support of this contention. Whilst this may be true as to the works of some of the composers of opera music, or as to individual selections from them, it is certainly not the general principle upon which this particular head of musical composition proceeds. In the recent American reprint of the *Encyclopædia Britannica*, we find it stated as the general and well-recognized principle of the opera that "the exigencies of the action and the requirements of the text should rule the musical designs in a lyrical drama, and that the instrumental portions of the composition should, quite as much as those assigned to voices, illustrate the progress of the scene and the significance of the words." This principle, which is said to have been anticipated by Monteverde as early as 1607, in his opera of *Arianna*, was recognized and followed a century and a half later in the works of Ritter von Gluck, and is the governing principle in all the musical compositions of the late Richard Wagner designed for the opera. "Such," says the *Britannica*, referring to this fundamental principle, "must be the true faith of the operatic composer; it has

again and again been opposed by the superstitious that feats of vocal agility, and other snares for popular applause, were lawful elements of dramatic effect; but it has never inspired the thoughts of the greatest artists and revealed itself in their work, and no one writer more than another can claim to have devised or to have first acted upon this natural creed."

The opera is essentially, and in every point of view, a dramatic composition, and its representation a dramatic exhibition. It is a matter of common knowledge that some of the most famous dramatic characters of modern times have developed their exquisite powers upon the operatic stage. It may, of course, be conceded that music is, in some sense, an essential element in the opera; in this respect, it is distinguished from the spoken drama, but the fundamental and really essential element of both is action.

The opera-house and the theater alike comprehend the stage, proscenium, boxes, orchestra, pit or parquet, and the galleries; the scenic representation is of the same general character, and the stage machinery and decorations of the same order. The ordinary theater is adapted to the performance of the opera, and it is well known that this form of exhibition, especially of the light opera and the opera comique, rendered "partly in song and partly in dialogue," forms, in these days, a prominent feature of theater work. Therefore, whether the term "theatrical," in the act of 1845, be deemed a qualification of the scenic representation, or of the house and its adaptations in which it may be effectively given, the opera would seem to be embraced within its meaning.

The legislature having determined as to the propriety and policy of requiring a license-fee for all theatrical exhibitions, it would be difficult to state any reasonable ground for a distinction between the spoken and the lyrical drama which would justify the exaction of a license-fee from one and the exemption of the other. They are exhibitions of the same general character, and there is no reason why one should bear the public burden more than the other. Both are places of popular amusement, and both collect large assemblages of the people and require additional police protection. These considerations are proper in determining the intent of the legislature.

It may be that, in the discussion of this case, we have gone out of the record somewhat. In this, we have followed the example of the learned and able counsel in the arguments

which they have submitted. We have passed upon the question, however, which was sought to be raised, and this is, doubtless, what was desired. We are of opinion that the court erred in entering judgment for the defendant on the case stated.

The judgment is therefore reversed, and judgment is now entered for the plaintiff in the sum of five hundred dollars, and costs.

PERFORMANCE OF OPERA WAS HELD NOT TO BE THEATRICAL PERFORMANCE in *Rowland v. Kleber*, 1 Pittsb. Rep. 68. This case, decided in the same state as the principal case, is not referred to in the opinion. The discussion of the question is upon the same lines as that of the court in the principal case, and yet this court seems to have reached a different conclusion.

HUEY v. GAHLENBECK.

[121 PENNSYLVANIA STATE, 228.]

NEGLECTENCE — EVIDENCE. — OWNER OF PREMISES IS NOT LIABLE IN DAMAGES FOR INJURY SUSTAINED BY ANOTHER while lawfully thereon, in the absence of any evidence as to the direct cause of the injury, or that it was the result of the owner's negligence.

ACTION brought by August Gahlenbeck against William G. Huey to recover damages for personal injuries sustained. The facts appear in the opinion. Verdict and judgment for the plaintiff, and the defendant assigned error.

Walter J. Budd and John G. Johnson, for the plaintiff in error.

A. S. L. Shields, for the defendant in error.

PAXSON, J. The fifth assignment of error raises the only question I propose to discuss in this case. The defendant's fifth point called upon the court to instruct the jury that "under the facts proved in this case the verdict should be for the defendant." The court refused to affirm this point. The result was a verdict against the defendant for two thousand dollars, without a particle of proof to convict him of negligence.

The defendant below had a place of business where merchandise and other property is received for storage purposes. The plaintiff had a number of boxes and trunks there on storage. On the morning of August 10, 1885, the plaintiff called

at said warehouse to get one of his trunks. He was invited into the warehouse to point it out. He followed William H. Huey, a clerk of defendant, into the warehouse for that purpose. Whilst so engaged, the plaintiff fell down the elevator-hole into the cellar, and was injured. About this there can be no dispute, as he was found there in an injured state and taken to the German Hospital. If this were all, the plaintiff would have no cause of action, as he knew of the elevator, and could and should have avoided it. But the plaintiff alleges, and so testified upon the trial below, that he was injured by something falling upon him. He said: "I saw the elevator when I went into the back part of the place, and when I got near to the elevator, something came down and struck me, and scraped my face, and I fell down upon my back." The witness was not able to say what it was that struck him; he did not see anything, nor did any other witness notice an article of any kind in the building out of place. There was no evidence that the boxes and parcels with which the place was filled had not been piled up with proper care, or that any one of them had fallen down. There was not a *scintilla* of proof that the defendant had been guilty of any negligence; there was absolutely nothing beyond the fact that the plaintiff was lawfully in the defendant's store, and while there, was injured by something, which no witness saw or could describe, falling upon him. Was this sufficient to convict the defendant of negligence?

I do not understand that when A is lawfully upon the premises of B, for business purposes or otherwise, that B is absolutely liable as a guarantor for the safety of A. If an accident occurs to the latter under such circumstances, without negligence on the part of B, I am unable to see how, under any rational rule of law, B is to be held responsible.

The case of *Scott v. Docks Company*, 3 Hurl. & C. 596, cited in Wharton on Negligence, at page 701, and relied upon by the plaintiff below, differs from this in an essential particular. In that case a custom-house officer, visiting a store upon his lawful business, was injured by the fall of sugar-bags from a loft over a door on the defendant's premises. No explanation was given of the cause of the occurrence. The fact was, however, held evidence of negligence, "as such a passage-way should be guarded from casualties that could be prevented by due care." It will be observed that in the case cited the plaintiff was injured by a bag of sugar falling upon him. If the plain-

tiff in this case had been struck by one of the boxes piled up in the store falling upon him, we would have no hesitation in saying that it was evidence that the boxes had been piled negligently. Just here is the pinch of the plaintiff's case. He cannot say what struck him. It may have been the act of some one not in the employ of defendant; possibly a mere trespasser on the premises. The like criticism may be made of the case of *Briggs v. Oliver*, 4 Hurl. & C. 403, and others cited by defendant in error. The nearest approach to the case in hand is *Lake Shore R. R. Co. v. Rosenzweig*, 113 Pa. St. 519. In that case the plaintiff could not say what struck him; he could describe certain things around him which might have done so, and he was allowed to recover a verdict of \$48,750. That case certainly went much further than any other in this country or in England, in the line of allowing a recovery without evidence. It was heard in the absence of two of the members of the court, and those that sat were not unanimous. We are not disposed to go any further in that direction, or to follow it to the extreme length now asked of us, but we will allow it to stand upon its own facts. Aside from this case I know of no well-considered case that will sustain the one in hand. The mere fact that something fell on the plaintiff's head, without more, is not evidence of negligence on the part of the defendant. He cannot be convicted of negligence and compelled to pay a large sum of money without proof. We are not prepared to sustain the doctrine that the owner of property is liable for every injury that may occur to another therein or thereon, in the absence of any evidence that such injury was the result of the negligence of the owner. We are of opinion that the defendant's fifth point should have been affirmed.

Judgment reversed.

PRESUMPTION OF NEGLIGENCE WHEN AN INJURY HAS BEEN SUFFERED, AND THERE IS NO EVIDENCE SHOWING WHO WAS AT FAULT. — As a general proposition, a party who charges negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty incumbent upon him, and thereby caused the injury complained of: *Nitro-Glycerine Case*, 15 Wall. 524, 537; *Mitchell v. Chicago etc. R. R. Co.*, 51 Mich. 236; 47 Am. Rep. 566; *Philadelphia etc. R. R. Co. v. Stebbing*, 62 Md. 504; *Atkinson v. Goodrich Transp. Co.*, 69 Wis. 5; *Hayes v. Michigan Central R. R. Co.*, 111 U. S. 228, 240; *David v. Metrop. R'y Co.*, L. R. 3 Com. P. 591; *Chicago R. R. Co. v. Trotter*, 61 Miss. 417. If the injury arises from a casualty purely accidental, the party is necessarily left to bear it. It is not enough to show merely that an accident happened, and that injury resulted therefrom: *Lewis v. Railroad Co.*, 54 Mich. 55; 52 Am. Rep. 790; *Bennett v. Ford*, 47 Ind. 264; *Curran v. Warren etc. Mfg. Co.*, 36

N. Y. 153; *Wabash etc. R. R. Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193; and where an event takes place, the real cause of which cannot be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences which are designated as purely accidental, and the party who asserts negligence must show enough to exclude the case from the class so designated: *Id.*

Nevertheless, that an accident may be of such a nature as to raise a presumption of negligence is fully sustained by authority. The doctrine is maintained that proof of the occurrence of an accident which, under ordinary circumstances, would not have happened if due care had been exercised, raises a presumption of negligence, and the burden of proof is then cast upon the defendant to rebut this presumption: *Tuttle v. Railroad Company*, 48 Iowa, 236; *Kaples v. Orth*, 61 Wis. 531; *Breen v. New York etc. R. R. Co.*, 109 N. Y. 297. Or, as expressed in an English case, "where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care": *Scott v. London etc. Docks Co.*, 3 Hurl. & C. 596; and see, to the same effect, *Kearney v. Railway Co.*, L. R. 5 Q. B. 411; 6 Id. 759; *Bridges v. North London R'y Co.*, 6 Id. 377; *Gee v. Railway Co.*, 8 Id. 161. In such case, however, it is hardly accurate to say that negligence is presumed from the mere fact of the injury, but rather that it may be inferred from the facts and circumstances disclosed, in the absence of evidence showing that it occurred without the fault of the defendant. Such a case comes within the principle of *res ipsa loquitur*; the facts and circumstances speak for themselves, and in the absence of explanation or disproof, give rise to the inference of negligence: *Kearney v. Railway Co.*, L. R. 5 Q. B. 411; 6 Id. 759; *Briggs v. Oliver*, 4 Hurl. & C. 407; *Kirt v. Railroad Co.*, 46 Wis. 489; *Kaples v. Orth*, 61 Id. 531; *Cummings v. National Furnace Co.*, 60 Id. 603; *Rose v. Stephens etc. Transp. Co.*, 20 Blatchf. 411. The proof which establishes the injury shows also circumstances from which some negligence or want of care may be attributed to the wrong-doer: *Young v. Bransford*, 12 Lea, 232, 237. But what particular circumstances shall be sufficient to establish a *prima facie* case of negligence is often a matter difficult to determine. It has, however, been held, in cases where it appeared that persons passing along public streets or highways had sustained injury by being struck with dangerous substances thrown, or by the falling of objects, from buildings into public streets, that, from the happening of such an accident, in the absence of explanatory circumstances, negligence will be presumed: *Byrne v. Boodle*, 2 Hurl. & C. 722; *Scott v. London etc. Docks Co.*, 3 Id. 596; *Lyons v. Rosenthal*, 11 Hun, 46; *Murray v. McShane*, 62 Md. 217; *Kaples v. Orth*, 61 Wis. 531. So the law casts upon the owners of ruinous buildings adjoining a highway the duty of preventing their being or becoming dangerous to persons lawfully passing along the highway, and failure in such duty, with resulting damage, furnish *prima facie* evidence of negligence by the maxim, *Res ipsa loquitur*: *Vincett v. Cook*, 4 Hun, 318; *Mullen v. St. John*, 57 N. Y. 567; 15 Am. Rep. 530. These cases go upon the theory that the injurious thing was inherently and intrinsically dangerous, hurtful, and insecure; hence it was necessary for the defendant to show that he was exercising reasonable care at the time of the accident: *Id.*; *Wabash etc. R. R. Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193, 200. It has been held that the mere fact of the explosion of a steam-boiler, unexplained, raises a presumption of negligence: *Cosulich v. Standard Oil Co.*, 23 Jones & S. 384; *Rose v. Stephens etc. Transp. Co.*, 20 Blatchf. 411;

Fay v. Davidson, 13 Minn. 522; *Illinois Cent. R. R. Co. v. Phillips*, 55 Ill. 194; but compare *Young v. Bransford*, 12 Lea, 232; *Marshall v. Wellwood*, 38 N. J. L. 339. So where an elevator fell without any apparent cause, and injured the plaintiff, the court held that, as ordinarily an elevator properly constructed and properly managed does not fall, and as that elevator did fall, the presumption was that there was something wrong, either with the elevator or with the management of it, and that presumption would warrant a verdict for the plaintiff unless it were rebutted by the defendant's evidence: *Gerlach v. Edelmeyer*, 15 Jones & S. 292; 88 N. Y. 645. So the fact that telegraph wires are found swinging across a highway, at a height to obstruct and endanger ordinary travel, is in itself, unexplained, evidence of negligence: *Thomas v. Western Union Tel. Co.*, 100 Mass. 156; compare *Wabash etc. R. R. Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193.

In cases which involve the duties of carriers who contract to carry passengers safely to a particular destination, proof of an injury ordinarily establishes a *prima facie* case of negligence in favor of the passenger, which the carrier must overcome: *Cleveland etc. R. R. Co. v. Newell*, 104 Ind. 264; 54 Am. Rep. 312; *Smith v. St. Paul etc. R. R. Co.*, 32 Minn. 1; 50 Am. Rep. 550, and recent cases collected in note 553-560; *Nitro-Glycerine Case*, 15 Wall. 537. A *prima facie* case is made out by proof that the relation of carrier and passenger existed between the parties; that an accident occurred resulting in injury to the passenger; and that it was occasioned by the failure of some portion of the machinery, appliances, or means provided for the transportation of the passenger. This proof being made, a presumption of negligence on the part of the carrier arises, and the plaintiff is not bound to go further, and show the particular defect or cause of the accident, until the presumption is rebutted: *Wall v. Livesay*, 6 Col. 465. But the rule is held to be confined to cases in which the accident results from defective track, vehicles, machinery, or motive power of the carrier, and that in other cases the negligence must be proved: *Federal Street etc. R'y Co. v. Gibson*, 96 Pa. St. 83; and see *Wilson v. Railroad Co.*, 26 Wis. 278; *Mitchell v. Chicago etc. R. R. Co.*, 51 Mich. 236; 47 Am. Rep. 566. As illustrating the rule, it has been held that negligence is to be presumed from the overturning of a car: *Denver etc. R. R. Co. v. Woodward*, 4 Col. 1; or a stage-coach: *Wall v. Livesay*, 6 Id. 465; so if a car is thrown from the track and crushed, and there is a broken rail: *George v. Railroad Co.*, 34 Ark. 613; so the fact of a collision between cars belonging to the same company upon a railway track raises a presumption of negligence on the part of the company: *Smith v. St. Paul etc. R. R. Co.*, 32 Minn. 1; 50 Am. Rep. 550; so where a passenger on a street-railway car is injured by a sudden jerk of the car in transit: *Dougherty v. Missouri R. R. Co.*, 81 Mo. 325; 51 Am. Rep. 239. But where a passenger on a street-car was struck and injured by a passing load of hay, it was held that, in order to make the company liable, the passenger must prove, not only that he was without fault, but that the company was negligent: *Federal Street etc. R'y Co. v. Gibson*, 96 Pa. St. 83. In a more recent case, however, a passenger upon a steamboat received serious injuries by reason of an explosion that took place thereon, which subsequently caused his death. In an action against the company, the defendant proved conclusively that the explosion was not of the boiler or machinery of the boat, and gave evidence to show that it was not caused by gunpowder or petroleum; but neither the plaintiff nor the defendant gave any testimony which established the cause of the explosion. The court below gave binding instructions to the jury to find for the defendant, which the court, on appeal, held to be error. And

the broad doctrine was asserted that the mere happening of an injurious accident to a passenger while in the hands of the carrier will raise *prima facie* a presumption of negligence, and throw the *onus* on the carrier of showing the absence of negligence by him: *Spear v. Philadelphia etc. R. R. Co.*, 119 Pa. St. 61; citing *Laing v. Calder*, 8 Id. 482; *Sullivan v. Railroad Co.*, 30 Id. 239; *Railroad Co. v. Norton*, 24 Id. 465. The fact that a stage-plank, placed for the use of passengers in landing from a steamboat, fell while a passenger, in the exercise of due care, was walking over it, was held sufficient to create a presumption of negligence on the part of the owners of the boat: *Eagle Packet Co. v. Defries*, 94 Ill. 598; 34 Am. Rep. 245.

Although the presumption of negligence from the fact of an accident resulting in injury has been more frequently applied in cases against carriers of passengers than in any other class of cases, yet there is held to be no foundation in authority or in reason for any such limitation of the rule. The presumption arises from the nature of the act, not from the relations between the parties: *Rose v. Stephens etc. Transp. Co.*, 20 Blatchf. 411; *Cosulich v. Standard Oil Co.*, 23 Jones & S. 384, 393. But the maxim, *Res ipsa loquitur*, has no application in the case of an accident which is claimed to have happened through the negligence of the defendant, where the cause of the accident is known to a certainty: *Brennan v. Gordon*, 3 N. Y. St. Rep. 604; and see *Muster v. Railroad Co.*, 61 Wis. 325, 329.

The supreme court of Indiana, after a careful review of the authorities, deduces the rule that in order that liability may attach for injury occasioned by something not inherently dangerous and defective, which is found upon the grounds of or in use by one who is under a qualified obligation to the injured person, it must be shown that the defendant either knew, or that by the exercise of such reasonable skill, vigilance, and sagacity as are ordinarily possessed and employed by persons experienced in the particular business to which the thing pertains he should have known, of its dangerous and defective condition, and that the natural and probable consequence of its use would be to produce injury to some one: *Wabash etc. R. R. Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193. See also *Curran v. Warren Mfg. Co.*, 36 N. Y. 153; *Nason v. West*, 78 Me. 253; *Dubois v. Kingston*, 102 N. Y. 219.

GIVEN'S APPEAL.

[121 PENNSYLVANIA STATE, 290.]

JUDGMENTS, RESTRAINING ENFORCEMENT OF. — COURT SITTING AS COURT OF EQUITY HAS NO POWER to interfere with the records of the common pleas, and strike therefrom a judgment entered by that court; but if a proper case is presented, it may enjoin the plaintiff from proceeding to enforce the judgment.

BILL IN EQUITY WILL LIE TO RESTRAIN ENFORCEMENT OF JUDGMENT ENTERED upon a bond given in settlement of the criminal charge of forgery, if the defendant has had no day in court, and has not been guilty of laches in setting up the defense when he had an opportunity to do so. But where the complainant, pending an appeal from a decree erroneously dismissing such bill, obtains a rule to show cause, and an order opening the judgment, and admitting him to a defense, and these latter proceedings appear of record, the dismissal of the bill will be affirmed.

BILL in equity. The opinion states the case.

Sydney Biddle and Walter J. Budd, for the appellant.

Hood Gilpin, for the appellee.

CLARK, J. On the 28th of August, 1882, Amanda M. Given executed and delivered to Howard R. Kern a bond bearing that date, in the sum of fourteen hundred dollars. A warrant of attorney was annexed to the obligation, under which, on the 31st of August, judgment was confessed in the court of common pleas No. 4, of Philadelphia, to No. 606, June term, 1882. No further proceedings appear to have been taken thereon until in July or August, 1887, when an attempt was made to revive the judgment, and thereupon this bill was filed. The bill, after stating the circumstances under which the bond was executed, sets forth that it was delivered by Amanda M. Given, and accepted by Howard R. Kern, solely to secure the release of one George A. Tomlinson from arrest and imprisonment for the crime of forgery, of which he was guilty; that the bond had no other consideration to support it. The prayer of the bill is: 1. That the bond may be declared illegal and void; 2. That the judgment and the writs of *scire facias* be stricken off; 3. That Kern be restrained from further proceedings thereon, either for the reviving thereof or by execution; and 4. For further relief. The proceeding is by bill in the equity forms. The court below, as a court of equity, of course had no power to interfere with the records of the common pleas as a court of law, and upon appeal we have no greater power than might have been exercised below. The jurisdiction of the common pleas in the entry of the judgment is undoubted, and we cannot strike it off or remove it from the record of that court. The first two prayers of the bill, therefore, we have no power to grant. If a proper case is presented, however, we may enjoin Kern from proceeding to enforce the judgment, but the injunction in such case would not be addressed to nor would it operate on the court of common pleas; it would be addressed to him, and would in terms prohibit him from resorting to the legal jurisdiction in which his judgment was obtained for enforcement thereof. Upon a rule to open or strike off in the common pleas, the court may lay its hands upon the judgment itself; but when the proceeding is by bill in the equity forms, the remedy is directed to the parties only.

The real question for consideration therefore is, whether or not, as a court of equity, we ought to enjoin Howard R. Kern from further proceeding on his judgment by execution or otherwise. It would seem to be settled in Pennsylvania that chancery will grant relief by injunction to stay proceedings, where a judgment is procured by fraud, or given upon a consideration which is illegal, or upon a transaction contrary to public policy, or in violation of the law, provided the defendant has had no day in court, and has been guilty of no laches in failing to set up the defense when he had an opportunity to do so. This is the doctrine of *Wistar v. McManes*, 54 Pa. St. 318; 93 Am. Dec. 700; and that case has been followed in a number of cases in the common pleas: See *Cheyney v. Wright*, 7 Phila. 431; *Hetzell v. Bentz*, 8 Id. 261; *Leb. Mut. Ins. Co. v. Erb*, 16 Week. Not. 113. To the same effect, also, is the reasoning of our late brother Trunkey, in *Knarr v. Elgren*, 19 Id. 531; see also *Barker v. Elkins*, 1 Johns. Ch. 466; *Henderson v. Hinckley*, 17 How. 445; 3 Lead. Cas. in Eq. 194. The jurisdiction in equity in such cases is also assumed in *Gordinier's Appeal*, 89 Pa. St. 528, and in *Frauenthal's Appeal*, 100 Id. 290; in these cases, however, it was held, modifying the rule laid down in *Wistar v. McManes*, *supra*, in this respect, that a bill in equity cannot be maintained to restrain execution upon a judgment at law, where a rule to show cause, etc., founded on the same facts, had previously been discharged by the court.

In the case now under consideration, the effect of the demurrer is to admit that the bond was given in settlement of the criminal charge of forgery of which the son-in-law of the obligor was guilty, and that upon giving the bond the criminal was discharged from arrest and imprisonment. The consideration of the bond was therefore illegal: *Bredin's Appeal*, 92 Pa. St. 245; 37 Am. Rep. 677; and in equity the obligation was void. Such agreements have a manifest tendency to subvert public justice, and equity will not permit them to be enforced: 1 Story's Eq. 294. "Forgery, or the *crimen falsi*, is an infamous offense; it is classed with other infamous felonies and misdemeanors, the compounding of any of which is a misdemeanor, punishable by fine or imprisonment: Act 31st March, 1860, P. L., sec. 10, p. 387. Under section 9 of the criminal procedure act of 1860 (P. L. 432), no magistrate or court can lawfully permit a settlement of a prosecution for forgery, on satisfaction being made to the party complaining, for infamous crimes are ex-

cepted from its operation. . . . Stifling a prosecution for forgery, though an offense of the same grade as compounding divers felonies, seems to be a graver offense than compounding some felonies. It comes within the rule that where the welfare of society and the vindication of the law are the chief objects, the defendant may give in evidence the illegality of the contract, as a bar to a suit to enforce it; and this to prevent the evil which would be produced by enforcing the contract, or allowing it to stand": *Bredin's Appeal*, *supra*.

The judgment having been entered by confession upon warrant of attorney, the question of the illegality of the consideration was not considered at the entry of the judgment; the defendant cannot be charged with laches in failing to set up her defense, for she has had no opportunity. We are inclined to the opinion, therefore, that the facts set forth in the bill present such a case as equity would take cognizance of, and that the decree sustaining the demurrer and dismissing the bill must be reversed.

But it was stated at the argument, and it is also set forth in the appellee's paper book, and we do not understand the fact to be denied, that the complainant here, after her bill was dismissed below, filed her petition in the law side of the common pleas, setting forth substantially the same facts contained in the bill; that she obtained a rule to show cause, etc., and upon hearing of that rule, the judgment was opened, and the defendant admitted to a defense. This fact does not appear in the record, however, and we cannot give it any consideration in the decree. If this be so, however, she needs no equitable relief. The common-law court, which at her request has now taken cognizance of the case, has full jurisdiction, under our practice, to consider the matters of defense alleged in the bill. She virtually abandoned the proceeding by bill in taking the rule and procuring an order in another jurisdiction. The judgment having been opened, the defendant therein has opportunity to set up her defense, and after a trial and judgment upon the issue thus presented, the matters of defense set forth in the bill will be *res adjudicata*, and equity will not retry the issue. It matters not whether the specific matters of defense stated in the bill are actually set up at that trial or not; for if they are not, the defendant in the judgment has thereby had her day in court. If this were not so, the court of common pleas must hear and determine the same matter twice. If when this record is remitted, therefore, it shall be

made to appear that the complainant has already obtained relief under proceedings at law, the court will doubtless dismiss the bill on that ground, as we would certainly do now if the facts alleged were disclosed by the record.

The decree is reversed, and the record remitted for further proceedings, the appellee to pay the costs of this appeal.

EQUITY WILL NOT INTERFERE TO RESTRAIN ENFORCEMENT OF JUDGMENT where defendant has remedy at law: Freeman on Executions, secs. 435 et seq. The most effectual mode of preventing abuse of process by using it to enforce void judgment is by extirpating the judgment itself: *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448. When, however, a party has no remedy at law, a court of equity will enjoin the enforcement of a void judgment: *Id.*; *Coward v. Chastain*, 99 N. C. 443; *ante*, p. 533; *Wingfield v. McLawr*, 48 Ark. 510.

McNAIR v. WILCOX.

[121 PENNSYLVANIA STATE, 487.]

TROVER AND CONVERSION. — WHERE ONE WRONGFULLY CONVERTS PROPERTY AT TIME UNDER LEVY on execution process, and afterwards satisfies the execution by becoming the purchaser of the judgment under which the process issued, the property is thus released from the custody of the law, and its owner is thereafter in a position to maintain trover against the wrong-doer.

PARTNERSHIP. — IF ONE PARTNER TRANSFERS TO STRANGER PARTNERSHIP PROPERTY not held for the purpose of trade or sale, the transfer being made without the knowledge or consent and in fraud of the rights of his copartner, the latter may maintain trover against the transferee who refuses to surrender possession of the property on demand.

ACTION of trover brought by McNair against Wilcox, for the taking and conversion of horses, carriages, and other stock of a livery-stable in which the plaintiff was part owner. At the time of the alleged conversion, the property was under levy on execution against the firm of McNair and Barton. Other facts appear in the opinion.

William Benson and Brainerd, for the plaintiff in error.

J. W. Wetmore and L. S. Norton, for the defendant in error.

STERRETT, J. In this action of trover and conversion, a special verdict was rendered in favor of plaintiff for \$1,408, the amount of his interest in the property, subject to the opinion of the court on the question of law raised by the facts recited in the special verdict. That question is, whether, under the circumstances, trover and conversion can be main-

tained by plaintiff. The learned president of the common pleas held it could not, for the reason that, while plaintiff was then interested in the property wrongfully obtained by defendant, he had neither actual possession thereof, nor the right of immediate possession; and he accordingly directed judgment for defendant *non obstante veredicto*. The only error assigned is the entry of that judgment instead of a general judgment for plaintiff on the verdict.

As the case was presented to us by the learned counsel, it has been unnecessarily encumbered by the consideration of irrelevant matters not necessarily involved in the special verdict. The only question considered by the court below, or necessary to be noticed here, is the one above stated.

The conclusion reached by the learned judge was, that the executions and levies on the property in question at the time it was wrongfully taken by defendant had the effect of depriving plaintiff of the legal possession, as well as the right of immediate actual possession, and vesting the same in the sheriff. Conceding the correctness of that position, during the time the levies were in force, it will be observed that a different condition of affairs supervened long before this suit was brought. It is found as a fact, by the special verdict, that defendant "was notified by the sheriff that he must either return the property to him at Corry or satisfy the executions, which latter he did by becoming the purchaser of the judgments. The defendant then kept the property, and plaintiff afterwards brought this suit." It thus appears that the constructive possession of the sheriff, as well as his right to actual possession of the property, ceased as soon as defendant acquired control of the judgments, and the executions were returned. The property was thus released from the grasp of the executions, and, so far as they were concerned, plaintiff's right to immediate possession was revived. Thereafter he was in a position to maintain this action against defendant, who had wrongfully obtained custody of the property; and that was the *status* of the parties when this suit was brought, in July, 1877.

Nor was plaintiff's right to maintain the action affected by the fact that the property was transferred to defendant by plaintiff's partner. Plaintiff's interest in the property was not divested by the unauthorized assignment of his partner, made without his knowledge, and in fraud of his rights. Speaking of the power of one partner to dispose of firm property, Mr. Justice Strong, in *Sloan v. Moore*, 37 Pa. St. 217, 223, says:

"Still less can authority be admitted in one partner to sell the entire property of the firm, when the object of the firm was not trade, buying, and selling, but a business to which the continued ownership of the property was indispensable. An assignment is for the purpose of paying the debts; but a sale principally for division, as was this case, has not even that apology. Such a power in one of two copartners is asserted by no adjudicated case. It is directly in conflict with the purposes of the partnership. Instead of a presumption of agency to make such a sale, the presumptions are all the other way." The sale to defendant, in this case, was not for the purpose of paying firm liabilities, nor for any other legitimate purpose; and defendant having refused, on demand of plaintiff, to surrender possession of the property he had wrongfully obtained, the plaintiff had a right to maintain this action.

It is well settled that where one joint owner of personal property sells or converts it to his own use, the other may sue in trover for its value: *Agnew v. Johnson*, 17 Pa. St. 373, 378; 55 Am. Dec. 555. As stated in that case, the reason why one partner cannot, as a general rule, maintain trover against the other is, that both are equally entitled to possession, and the possession of the one is the possession of both; but if one deliver the property wrongfully to a stranger, for purposes inconsistent with the uses for which it was designed, and such stranger denies the title of the other, and claims the exclusive possession and ownership, the reason of the rule ceases, and trover may be maintained. We are of opinion that, upon the facts established by the special verdict, plaintiff was entitled to judgment thereon for the amount found by the jury, and the court therefore erred in entering judgment *non obstante veredicto*.

Judgment reversed, and judgment is now entered in favor of plaintiff on the verdict for \$1,408, the amount found by the jury, with interest from the date of the verdict, and costs.

PARTNER HAS AUTHORITY TO DISPOSE OF PARTNERSHIP PROPERTY AND EFFECTS in good faith, and for any and all purposes and objects of the partnership, and in the course of trade: *Wright v. Boynton*, 37 N. H. 9; 72 Am. Dec. 319.

JACOBS v. COMMONWEALTH.

[121 PENNSYLVANIA STATE, 586.]

CRIMINAL LAW. — EVIDENCE AS TO TEMPERAMENT, DISPOSITION, AND CONDITION OF MIND of the defendant is not admissible on the trial of an indictment for murder, where insanity at the time of the homicide is not set up as a plea.

INDICTMENT for murder. The opinion states the case.

B. Frank Eshleman and J. Hay Brown, for the plaintiff in error.

William D. Weaver, district attorney, and *E. K. Martin*, for the defendant in error.

GORDON, C. J. That the verdict in this case, under the instructions of the court, was right, and warranted by the facts proved, no one pretends to deny. Neither is it contended that Jacobs, the defendant, was insane, in the legal acceptance of that word. That he was able to know and to distinguish between right and wrong is not gainsaid. That he had sufficient time for deliberation before he committed the fatal act, and that he acted, if not wholly without provocation, yet certainly without enough to excuse in the slightest degree so barbarous an act, the jury, on sufficient evidence, have found. Being thus relieved of all doubt as to the sufficiency of the evidence and the justness of the verdict, all we have to do is to consider those technical assignments of error which have been presented to us by the learned counsel for the plaintiff in error. These specifications are three in number, as follows:—

"1. The court erred in overruling the following question put to Dr. Joseph Furness: 'Were you able to judge, in your intercourse with him, what his temperament, disposition, and condition of his mind was?'"

"2. The court erred in overruling the following question put to the same witness: 'State what are the quality and characteristics of defendant's mind as to excitability.'"

"3. The court erred in overruling the following question put to the same witness: 'Please state whether or not, in your judgment, there were such controlling influences in the mind of James H. Jacobs, the defendant, that it was not conscious of its purposes, and on account of those influence was incapable of deliberating or premeditating; and if so, what were those controlling influences?'"

The questions thus proposed were properly rejected, because, had the required answers been received, the court could have done nothing else than instruct the jury to disregard them. They were intended, not to establish the fact that Jacobs, when he committed the homicide, was constrained by an insane impulse which for the time destroyed his free agency, but only to show that he was of an excitable temperament; that is, as we take it, that he was a man of quick temper, and when his anger was aroused, his self-government was for the moment overcome, and he was at such times liable to commit acts which his cooler judgment would not approve. But a rule which would allow the justification of crime on such pretext would utterly pervert and subvert the moral order of things. It may do well enough when applied to the brute world, where there neither is nor can be such a thing as moral obligation, and where individual impulses are regarded as mere instincts, without mental control, but it will not do for the government of man, to whom God has given a reasonable soul, by which, if he will, all his passions may be controlled. And why should one man be excused for the results of passion, and not another? The phlegmatic man may be moved to anger as well as the most nervous; the only difference is, that it requires more to affect the one than the other; but when passion is once aroused in either, it is the same unreasoning and unreasonable power. Why, then, should it not excuse crime in the one as well as in the other? If the murder of the latter may thus be reduced in degree, why not that of the former? Questions such as these at once show the utter inapplicability of the rule contended for, hence it must be rejected. The main object of the penal code is to compel men to restrain their evil passions and desires, hence the want of such restraint is rather an aggravation of than an excuse for crime.

But we need not dwell longer upon this subject, for the underlying principle of the above-recited assignments has been fully considered and disposed of by this court, in the case of *Small v. Commonwealth*, 91 Pa. St. 304, in which we held that the evil dispositions of a defendant were not admissible in evidence for the purpose of excusing or mitigating his crime. We also refer to the forcible and pertinent remarks of Mr. Justice Lowrie on a similar proposition in the case of *Keenan v. Commonwealth*, 44 Id. 55; 84 Am. Dec. 414.

The judgment of the court of oyer and terminer is now

affirmed, and it is ordered that the record be remitted to the said court for the purposes of execution.

EVIDENCE OF DEFENDANT'S GOOD CHARACTER is always admissible in criminal prosecution: *Hopps v. People*, 31 Ill. 335; 83 Am. Dec. 231; *People v. Garbutt*, 17 Mich. 9; 97 Am. Dec. 162.

GREGORY v. COMMONWEALTH.

[121 PENNSYLVANIA STATE, 611.]

PAYMENT, PRESUMPTION OF FROM LAPSE OF TIME. — ALL DEBTS EXCEPTED OUT OF STATUTE OF LIMITATIONS, UNCLAIMED and unrecognized for twenty years, are, in the absence of sufficient explanatory evidence, presumed to have been paid.

PRESUMPTION OF PAYMENT AFTER LAPSE OF TWENTY YEARS is an artificial and arbitrary rule of law, and, unlike the statute of limitations, is not a bar to an action on the original contract, and therefore a new promise is not necessary to sustain an action upon the debt. This being so, it is of no consequence that the admission of non-payment is accompanied by a refusal to pay.

FACTS AND CIRCUMSTANCES RELIED UPON TO REBUT PRESUMPTION of payment from lapse of time must necessarily be within twenty years before the suit is brought, and the evidence to rebut such presumption must be satisfactory and convincing, especially when suit is not brought until after the debtor's death.

EVIDENCE ADMISSIBLE TO SHOW THAT DEBT IS IN FACT UNPAID may consist of the defendant's admissions made to the creditor himself, or to his agent, or even to a stranger. But an admission will not be as readily implied from language casually addressed to a stranger as when addressed to the creditor in reply to a demand for payment of the debt.

WHETHER MATTERS SOUGHT TO BE ESTABLISHED IN REBUTTAL OF PRESUMPTION of payment from lapse of time are true, is a question for the jury; but whether the facts and circumstances relied on, if true, would amount to a rebuttal of the presumption, is necessarily a question of law for the court.

John Stewart and George A. Smith, for the plaintiffs in error.

W. U. Brewer, and John P. Sipes and J. Nelson Sipes, for the defendants in error.

CLARK, J. This is a proceeding by *scire facias* upon a recognizance, taken in the orphans' court of Fulton County, in the partition of the real estate of Joseph Gregory, who died intestate some time prior to the year 1856. The real estate of the decedent was, on the 13th of January, 1866, accepted at the valuation by James Gregory, and the recognizance in suit

was given to secure the share of John Gregory, who at that time, and until his decease in 1878, resided in the state of Indiana.

No suit was brought, nor does it appear that any specific demand for payment of the money secured by the recognizance was made, until after the death of the conusor, James Gregory, in 1887. A period of twenty-one years and three months having intervened, the executors of the last will and testament of James Gregory, deceased, interpose the presumption of payment which arises from this great length of time. Their contention is, that this delay in the collection of the recognizance has not been in any way explained, and that the evidence does not establish any facts, by way of admission or otherwise, sufficient to rebut the presumption that the debt has been discharged.

All debts excepted out of the statute of limitations, unclaimed and unrecognized for twenty years, in the absence of sufficient explanatory evidence, are presumed to have been paid. This presumption is an artificial and arbitrary rule of the law, derived by analogy from the English statute of limitations; it originated in equity, but was afterwards engrafted into the common law, and has since been steadily maintained. It is not, like the statute of limitations, a bar to an action on the original contract; therefore, a new promise is not necessary to sustain the suit. Any competent evidence which tends to show that the debt is in fact unpaid is admissible for that purpose. The evidence may consist of the defendant's admissions made to the creditor himself: *Eby v. Eby*, 5 Pa. St. 435; or to his agent, or even to a stranger: *Morrison v. Funk*, 23 Id. 423; *Reed v. Reed*, 46 Id. 239; but an admission will not be as readily implied from language casually addressed to a stranger, as when addressed to the creditor in reply to a demand for the debt: *Bentley's Appeal*, 99 Id. 500. It is of no consequence that the admission of non-payment is accompanied by a refusal to pay; the action is not founded on a new promise, but on the original indebtedness; the question, as against the presumption, is, whether or not the debt is in fact unpaid.

The facts and circumstances relied on to rebut the presumption must necessarily be within twenty years before suit is brought, and, as the recollection of the exact words and import of an oral admission must necessarily become more indistinct with the lapse of years, the force of such an admission will in general be lessened as the time from its occur-

rence increases. On the other hand, after twenty years the presumption will gather strength with each succeeding year, and the evidence to overthrow it must, of course, be correspondingly increased. After what lapse of time beyond twenty years, if ever, this presumption, which is disputable, will be conclusive has never been determined; and as the law now stands, each case must stand on its particular facts and circumstances. It is not required that the same precision and particularity of proof shall in all respects be observed as has been required to remove the bar of the statute of limitations; but as the presumption of payment after twenty years is a strong one (*Kline v. Kline*, 20 Pa. St. 508), the evidence to rebut it must be satisfactory and convincing: *Peters's Appeal*, 106 Id. 340; *Eby v. Eby*, 5 Id. 435; *Sellers v. Holman*, 20 Id. 324; especially is this so when the suit is not brought until after the defendant's death; it must, according to the cases, carry conviction to the mind of the court, that if the facts alleged are true, the matters in issue are definitely and distinctly established. In a case like this, the defendant stands upon a presumption of law which is binding alike upon the court and jury, until invalidated by proof; and the plaintiff, in rebuttal, upon a presumption of fact only, which he claims to arise out of the evidence; whether or not the matters sought to be established are true, is a question for the jury; but whether the facts and circumstances relied on, if true, would legitimately give rise to the presumption of fact referred to, is necessarily a question of law for the court.

In *Delany v. Robinson*, 2 Whart. 506, the trial judge directed the jury that the testimony of a particular witness, if true in fact, rebutted the presumption of payment in point of law, and that as there was no evidence in the cause which purported to contradict him, the question depended on his credibility, which was left to the jury. This was assigned for error, and Chief Justice Gibson, on a rule for a new trial, said: "The inference of payment from lapse of time is a presumption of law, and the subject of legal direction; every jurist, whether judge or text-writer, treats of it as such. The rebuttal of it by circumstances left to the jury for the truth of the fact only is also for the court." To the same effect is the language of the same learned judge in *Backstoes v. Commonwealth*, 8 Watts, 286, where, referring to the contrary doctrine of *McLean v. Finley*, 2 Penr. & W. 97, and *Summerville v. Holliday*, 1 Watts, 507, he says: "A different rule, however, was sub-

sequently laid down in *Delany v. Robinson*, 2 Whart. 503, and recognized in *Diehl v. Thrie*, 3 Id. 149, for the justness of which there are powerful arguments. Presumptions from lapse of time, being founded in policy and convenience, are in effect judicial statutes of limitation, which, as they are mixed of fact and law, are to be dealt with, not exclusively by the court or the jury, but by each according to its function, and within the limit of its province. The very period is borrowed from a statute; and what shall suspend the running of such a statute has always been for the court, because it is an unmixed question of law, which admits not of the action of a jury, just as an unmixed question of fact admits not of the action of a court. But from the decision of a mixed question, the court has as much right to exclude the jury as the jury have to exclude the court; so that to act legitimately they must act in unison, each in its sphere, the jury pronouncing the facts, and the court assigning them their consequences."

In *McQuesney v. Hiester*, 33 Pa. St. 435, the action was for arrears of ground-rent for twenty-eight years. It appeared in the defendant's proofs that the parties under whom the defendant claimed had entered into an agreement with other lot-owners not to pay until the plaintiff established his right, but to resist payment, and that they did resist payment. The court thereupon ruled, as matter of law, however, submitting the question to the jury, that from these facts thus established the delay was explained and accounted for, and that no legal presumption of payment arose. So in *Reed v. Reed*, 46 Pa. St. 239, Mr. Justice Strong says: "It must be borne in mind that the presumption from lapse of time is not that there is no contract between the parties. If it were, proof of a new contract might be necessary. It is only an inference that the debtor has done something to discharge the debt, to wit, that he has made payment; whilst it is rebutted by simple proof that payment has not been made, and the facts being established, whether they are sufficient to rebut it is a question for the court, and not for the jury. The presumption is one drawn by the law; it is from a given state of facts, and whether it exists or not is necessarily for the court. If authority is needed for so plain a proposition, it may be found in *Delany v. Robinson*, 2 Whart. 503, where it was squarely so decided." To the same effect is *Sellers v. Holman*, 20 Pa. St. 321; *Bentley's Appeal*, 99 Id. 500; *Michener v. Michener*, 17 Week. Not. 266; *Lash v. Von Neida*, 109 Pa. St. 207; *Biddle v. Girard Nat. Bank*, 109 Id.

349; *Boyd v. Grant*, 13 Serg. & B. 124; *Ankeny v. Penrose*, 18 Pa. St. 193. Therefore, in *Beale v. Kirk*, 84 Id. 415, our brother Paxson said: "The facts being established, whether they are sufficient to rebut it is a question for the court, not the jury; the presumption is only drawn by the law itself from a given state of facts, and whether it exists or not is necessarily for the court"; citing *Reed v. Reed*, 46 Id. 239; *Delany v. Robinson*, 2 Whart. 503. This declaration is repeated in *Peters's Appeal*, 106 Pa. St. 340.

It is undoubtedly true that by the earlier cases in this state (*McLean v. Finley*, *supra*; *Summerville v. Holliday*, *supra*), where there was any evidence to account for the delay, it was the duty of the court to refer it to the jury as an open question of fact to determine as to actual payment; but this doctrine, as we have seen, has been practically abandoned; the rule to be drawn from the later cases is in accordance with views expressed in the dissenting opinion of Mr. Justice Kennedy in *Summerville v. Holliday*, *supra*, where the origin, history, and proper application of the rule is most ably and elaborately considered.

It may be difficult, perhaps, to lay down any general rule by which the facts of each case may be determined, as matter of law, to be sufficient or insufficient to prevent the presumption of payment from arising, or to rebut it after it has arisen; but it is certainly consistent with the nature and design of this provision of the law that its application should be directed by the court rather than by the jury.

Applying these principles to the case now under consideration, was the evidence sufficient to justify the court in referring the case to the jury to determine as to the actual payment? James Gregory was the administrator of the estate of Joseph Gregory, deceased, and had settled his account, which, as confirmed by the orphans' court on the 24th of October, 1859, showed a balance of \$350.12 due to the accountants. The recognizance was entered into on January 13, 1866. Peter Gordon testified, in substance, that about the year 1875 he had a conversation with James Gregory, in which James said he had not heard from John lately; he thought John was dead. Gordon then asked him whether there was not a little coming to John from his brother Joseph's estate, and James replied that it "had never been fairly settled. James said he did n't know where he was; had n't heard from him for so long." Gordon states the conversation in these words: "I

says, Is n't there something coming to John from his brother Joseph's estate? Says he, I don't remember whether he said it was unsettled or whether it was n't fairly settled,—something that way; he said it had n't been fairly settled." What had not been fairly settled? Was it the personal estate or the recognizance? Apart from the legal presumption that the recognizance was paid, there is not the slightest proof that any settlement of it had ever been attempted. The reference would appear to be to something which had been settled, but not fairly settled. True, the witness was not able to remember whether James said that John's share had "never been fairly settled," or was "unsettled," but the burden of proof was upon the plaintiff, and we are not, without reason, to accept that alternative which may happen to be most favorable to him; but the testimony of Gordon may be read in the light of the other evidence. William Gordon testified as follows: "In August, 1886, James Gregory came to my place; he talked about going away; I told him he should n't be in a hurry, he did n't have much to bother him. He said he wanted to go back home; that he had got a letter from his brother John's son, and he had n't wrote to him; had n't answered his letter, and was anxious to get back and write to him to know who his mother was. He said his brother John had been dead about eight years; he said he had wrote to him to know who his mother was,—to his brother John's son. I did n't ask him at all how or when he owed him anything, but he said his brother Joe had paid a judgment for John a good many years back, and he did n't know but one would balance the other. He said if he was to drop off, he did n't hardly know how his business would be settled up. He said the son had written in regard to the share that his father claimed in his brother Joseph's estate." Catharine Gregory testified that she had a conversation with James Gregory (the time was not fixed). He said: "He had got a letter from one of John Gregory's heirs, that they wanted their father's interest in Joseph Gregory's estate, and then he said he wanted to be sure it was one of John Gregory's heirs, and he said he had wrote back to ask him to tell who his mother was before she was married to John Gregory. Last August a year he came to visit us again; he said he had got an answer from John Gregory's heirs, and he was certain now it was one of John Gregory's heirs; that he intended to send a little money some time; he said the heirs had wrote to him they wanted their father's

interest in Joseph Gregory's estate." Moses Peck testifies that he had a conversation with James Gregory. He says: "He (Gregory) got a letter; the letter came to our place; the letter was kept for him until he came. He handed it to Gus Robinson, and he read it. He says when he got to the place where it says, 'grandfather's estate,' he says, 'he is mistaken; it is brother Joseph,' says he. 'His grandfather was dead before my brother John was married.' That was about all. Says he, 'Uncle James, I understand you are administrator of grandfather's estate.' He wanted to know something about their affairs, and Mr. Gregory said he was mistaken; it was his brother Joe. He said he wanted to write and answer it, and did n't know how to write. He said he did n't think there would be anything coming to him, for he said his brother Joseph had paid some money for John, or loaned him some," etc.

This testimony would seem to have reference to the settlement of John's share in the personalty, for the debt secured by the recognizance was James's individual debt to John; what Joseph had loaned to or paid for John could not be considered in the adjustment of the recognizance; that was involved in the administration; "one would balance the other" only in the settlement with James's administrator. Although the administrator's account filed purported to be the final account, the testimony may readily be taken in the sense that James thought it had not been "fairly settled"; "he had a heap of trouble about it, and if he was to drop off, he did n't hardly know how his business would be settled up."

The testimony is vague, uncertain, and equivocal in meaning. It is not in our opinion of that satisfactory and convincing character which would justify its submission to the jury in rebuttal of the presumption of payment which the law raises when a debt of record is unclaimed and without recognition for a period of twenty-one years and three months. The fact that John Gregory resided in the state of Indiana is worthy of consideration on the general question, but standing alone does not explain this great delay. Absence in a foreign country, outside of the United States, would be a fact of more significance; but whether even that would be sufficient to repel the presumption, would depend, perhaps, upon the facts and circumstances of the case.

The rule of law invoked by the defendants is a salutary and useful one, especially in cases where the action is delayed, not

only beyond the period of twenty years, but until after the debtor's death. In England, by the statute of 3 & 4 Wm. IV., c. 42, sec. 3, and in New York under the Revised Statutes, and perhaps in other states, this period of twenty years has been established as a limitation to actions upon debts of record, by specialty, etc., and we think it wise, in the absence of any such statute, that the force of this presumption shall not be defeated, excepting where the evidence to that effect is of a satisfactory and convincing character.

The judgment is reversed.

THE PRINCIPAL CASE IS OFFERED to the fourth and fifth points stated in the syllabus in *Porter v. Nelson*, 121 Pa. St. 637, 638, in which case evidence of oral admissions of the debtor, made within twenty years before suit, and tending to show non-payment of the indebtedness, was held to be properly submitted to the jury, in connection with other evidence of facts from which payment might be inferred. And it is laid down as an established rule, applicable both at law and in equity, that all debts by specialty, unclaimed and unrecognized for twenty years, in the absence of explanatory evidence, are presumed to have been paid: *Breneman's Appeal*, 121 Id. 641. And credits indorsed upon a bond are not evidence of actual payment of the credits, sufficient to repel the presumption of payment of the bond, without proof that they were made within twenty years, and whilst it was against the interest of the obligee to make them: *Runner's Appeal*, 121 Id. 649. But in the distribution of a decedent's estate, declarations made by the decedent shortly before his death were held to exhibit an unequivocal acknowledgment of the existence of a specialty indebtedness, sufficient to repel the presumption of payment after the lapse of twenty years: *Id.*

PRESUMPTION OF PAYMENT FROM LAPSE OF TIME, GENERALLY: See the note to *Husky v. Maples*, 88 Am. Dec. 590, 591. Such presumption may be overcome by evidence, for it is a rebuttable presumption: *Lewis v. Schwenn*, 93 Mo. 26; 3 Am. St. Rep. 511, and note. The question of presumption of payment from lapse of time is one for the jury: *Lewis v. Schwenn*, *supra*.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

DEADERICK v. OULDS.

[86 TENNESSEE, 14.]

REPLEVIN — LOST PROPERTY. — A STRANDED SAW-LOG, WHICH IS UNMARKED, and has been lying unreclaimed among the rocks and drifts for more than two years, is lost property; and where the defendant, by his agents, takes possession of such property, this right of possession is not so lost by the log subsequently drifting upon the land of a riparian proprietor as to enable the latter, as special bailee of the true owner, to maintain replevin therefor against such defendant.

SPECIAL FINDING OF FACT BY THE COURT WILL BE REVERSED FOR ERRONEOUS APPLICATION OF THE LAW in case tried by court without a jury.

S. J. Kirkpatrick and I. E. Reeves, for the plaintiff.

H. H. Ingersoll, for the defendant.

LURTON, J. This is an action of replevin for the recovery of one walnut log. The defendant, Oulds, during the year 1883, cut and put in the headwaters of the Nollachucky River some eight hundred walnut logs, to be floated during the tides in the stream through the gorge in the mountains to a boom built by himself below the gorge. He undertook to have all of his logs branded with the letter "D," and while the proof shows it possible that some of his logs were not so branded, yet there is no sufficient proof to justify a finding that any of his logs were unmarked. Many of defendant's logs failing to reach the boom, he, in 1885, sent hands up into the gorge to search for logs which might have lodged upon the banks of the stream, or upon rocks or drifts. These hands found a number of logs stranded upon rocks or caught by drifts, which

were branded with the mark of defendant. With some of these marked logs found entangled in a drift was found the log now in controversy, it being without any mark or brand. This log was claimed by the servants of defendant for him, and it was again set adrift, along with the branded logs, that it might be carried by the currents to the boom of defendant below the gorge. This boom gave way before all these reclaimed logs reached it, and defendant was obliged to rely upon catching his logs upon the banks of the stream and islands below the broken boom. In December, 1885, this unbranded log, together with a marked one, were cast by the current upon an island in the stream belonging to plaintiff, Deaderick, who notified defendant, Oulds, not to move it until he identified it as his own. Oulds did identify it by peculiar cracks upon the end as the same unmarked log found by his servants entangled in a drift within the gorge of the mountains, and placed by them in the river; he therefore, claiming it as his own, removed it from the island to the public road, where it was replevied by plaintiff. While the proof shows that between the time defendant's logs were placed in the river and the finding of this unmarked log that no other person is known to have placed walnut logs in this river above the gorge, to be floated down, yet it is shown that, in 1883, one Wilson, who had cut walnut logs, to be sawed on his own premises above the gorge, lost by a high rise thirty unbranded logs, which had been carried down the stream. The contention of plaintiff, Deaderick, is, that this unmarked log is more probably one of Wilson's lost logs than one cut by Ould, and that, as the log was found upon his lands, defendant cannot take the log therefrom without proving that he himself is the true owner. The proof fails to establish the log to be one cut by defendant, Oulds, but it does satisfactorily show that it is the one found by defendant's servants lodged in a drift within the mountain gorge, and set adrift in the stream to be floated to defendant's boom below the gorge. On these facts, can the plaintiff recover?

The claim of plaintiff rests upon the proposition that the log is a lost log, and that, being found upon his land, he can hold it against every one but the true owner. This claim is not well founded. This log was lost, and had been lost in all probability for two or more years when found entangled among the rocks and drift in the gorge by the servants of defendant. It was then claimed for defendant, and possession

taken. This right of possession was not lost by the log subsequently drifting upon the land of plaintiff, and the defendant had a right to take and hold this log against all but the true owner, or one having a superior right of possession to that of the finder of lost property. It is undoubtedly true that it is not necessary, in all cases, that the plaintiff in trover or replevin must have an absolute right of property in the subject-matter of the litigation, but it is equally true that he must have a right of possession relatively superior to that of the defendant. Such a superior right of possession is not shown on the part of the plaintiff in this case. The prior finding and possession of the defendant is sufficient, not only to defeat the contention of the plaintiff, but was a sufficient title to have supported an action of replevin to recover the possession from any but the true owner: 2 Wait's Actions and Defenses, 234; 6 Id. 153; Smith's Lead. Cas., 7th ed., 648, and cases cited.

Lost property found on the premises of another may be rightfully retained by the finder as against the owner of the premises. Thus in *Bridges v. Hawksworth*, 7 Eng. L. & Eq. 424, the plaintiff, being in the shop of the defendant, picked up a parcel containing bank notes. The defendant, at the request of the finder, took charge of the notes to hold for the owner. After three years, no one having claimed them, the defendant refused to deliver them up to the plaintiff. The court held defendant liable in trover for the notes.

So in the case of *Hamaker v. Blanchard*, 90 Pa. St. 377, 35 Am. Rep. 664, a servant in a hotel found a roll of bank notes in the public parlor. Upon suggestion of the proprietor of the hotel that they belonged to a certain guest, they were delivered to the master for the guest. Proving not to be the property of the guest, the servant demanded the notes from the master, who refused to return them. It was held that she could recover them from the owner of the premises. To the same effect are the cases of *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528, and *Tancil v. Seaton*, 28 Gratt. 601, 26 Am. Rep. 380.

It is essential, however, in such cases, that the property must be found; that is, it must, at the time when the finder came upon it, have been in such a situation as to clearly indicate that it was lost, and not voluntarily placed by the owner where it was found, by carelessness or forgetfulness. If it was evidently laid where it was found, it then becomes the duty of the owner of the premises to keep the property for the

owner, as in such cases he is treated as a *quasi* bailee, and he may maintain trover therefor against the finder,—as if a pocket-book is found upon a desk or counter in a store or bank, the presumption is that the owner placed it there and forgot it: 6 Wait's Actions and Defenses, 153, 154, and cases cited.

In Tennessee, where a pocket-book was laid on a counter by the owner and forgotten, it was held that it was constructively in the possession of the owner, and larceny could be maintained against the owner of the premises who took the book, knowing the owner: *Lawrence v. State*, 1 Humph. 228; 84 Am. Dec. 644; *Pritchett v. State*, 2 Sneed, 288.

This log was not unintentionally laid or deposited by the owner on the land of plaintiff, and hence he was not a *quasi* bailee for the owner, and cannot hold against the superior right of defendant growing out of his prior possession and earlier finding of the log.

The distinction which undoubtedly exists between the rights of a riparian proprietor to drift-wood and other accretions which may drift upon his land, and the finding by a stranger, upon the premises of another, of articles dropped, need not be discussed here; for a riparian proprietor could not detain property stranded upon his bank as against either the true owner or one having a superior right of possession by reason of an earlier possession.

His honor the circuit judge tried this case without the intervention of a jury, and decided in favor of the plaintiff. In his special findings he held that, under the facts as above detailed, the plaintiff, Deaderick, was a special bailee, and as such entitled to hold the log as against all but the true owner. In this we think he committed an error of law.

The case will be reversed, and judgment rendered here in favor of the defendant.

LOST PROPERTY, WHAT CONSTITUTES: Note to *Bowen v. Sullivan*, 30 Am. Rep. 180-182.

FINDER OF PROPERTY REDUCING SAME TO POSSESSION IS NOT GUILTY OF CONVERSION: *Wyman v. Harburt*, 12 Ohio, 81; 40 Am. Dec. 461; and trover will not lie for such property in absence of proof of some tortious act on the part of the finder: *Burditt v. Hunt*, 25 Me. 419; 43 Am. Dec. 289.

EAST TENNESSEE, VIRGINIA, AND GEORGIA RAILROAD COMPANY v. DE ARMOND.

[86 TENNESSEE, 73.]

SERVANT DOES NOT ASSUME RISK OF NEGLIGENCE OF FELLOW-SERVANT, where the latter is engaged in a different department of the work or service; nor where the negligent servant is the superior, permanently or temporarily, of the injured one does the ordinary rule as to servants assuming risk for fellow-servant's negligence apply.

TELEGRAPH OPERATOR IS NOT FELLOW-SERVANT OF CONDUCTOR, although both are hired and paid by a common employer, and are engaged in an effort to accomplish a common result, to wit, the movement of trains, provided such operator has nothing to do with the actual movements or management of the trains, but is merely the agent through whom orders are transmitted regulating the same; such operator being also engaged in a different department of the service, and in a qualified degree a vice-principal of the train-dispatcher or superintendent, and so, in one sense, a superior.

DAMAGES — CONTRIBUTORY NEGLIGENCE. — Conductor receiving telegram negligently given him by telegraph operator, which, upon its face, did not concern the movements of his own train, instead of making inquiries by means of which a collision and consequent injury to him might have been avoided, is guilty of such contributory negligence as may properly be considered in mitigation of damages.

W. M. Baxter, and Henderson and Jourdmon, for the plaintiff.

Williams and Sneed, for the defendant.

FOLKES, J. De Armond was a conductor on a freight train of the East Tennessee, Virginia, and Georgia Railroad Company, and while so employed was injured in a collision occurring between the train under his charge going west and another freight train going east. This action was against the railroad company for damages. There was verdict and judgment in favor of De Armond. Motion for new trial overruled, and the railroad company has appealed in error.

The only error assigned which it is deemed necessary to notice presents the question as to whether the telegraph operator, whose negligence caused the accident, was a fellow-servant of the conductor, whose negligence was one of the risks assumed by the latter in entering the service of the company.

The record shows that the superintendent, through the train-dispatcher, had sent a telegram to one Brevord, the operator in the office at Cleveland, in the employ of the railroad company, directing that the train in charge of De Ar-

mond be held at Cleveland until No. 8 freight should reach that point. These trains, when on schedule time, passed at McDonald's, eight miles west of Cleveland. No. 8 had been telegraphed not to wait at McDonald's for the second section of No. 7 (the train in charge of De Armond), but to come on at once to Cleveland, and, as already stated, a telegram was sent to have De Armond's train held at Cleveland.

It appears from the proof that the rules of the company required a telegraph operator, when he had orders for conductors, to exhibit, at some conspicuous and designated place, a red flag by day and a red lamp by night; and conductors, upon seeing such signal, were to go at once to the telegraph office for instructions.

On the night upon which this accident happened, there was a red light exhibited by the telegraph operator, but it was not upon the post where it was usually hung; it was sitting on the platform. Its location, however, is deemed by us as immaterial, for the reason that it served the purpose of arresting the attention of De Armond, and, in consequence thereof, he went to the telegraph office of the company, and asked if there were any orders for him, and the operator handed him a telegram to the effect that "all cut-off trains have passed Ooltewah on time," and said: "This is all I have got." De Armond, under a rule of the company requiring conductors to report to operators the time of leaving a station, so that it can be forwarded to the train-dispatcher's office, thereupon gave Brevord the time of his intended departure, then a few moments off, and left to move his train out.

De Armond was running on schedule, a printed copy of which is in the hands of each conductor, and is his guide in moving his train, except where special orders are given by telegram.

The telegram as to cut-off trains at Ooltewah did not interfere with nor concern the movements of De Armond's train, and the operator failing to call his attention to the telegram ordering his train to be held at Cleveland, De Armond at once moved out with his train, intending to meet and pass No. 8 at McDonald's, the point of passage on the regular schedule, by which De Armond was running. A collision was the result, and De Armond received the injuries for which this suit was brought.

After stating the law correctly as to fellow-servants, and the non-liability of the company if they should find that relation-

ship, as modified and defined in our adjudged cases, the court, in its charge to the jury, said: "On the other hand, if you find De Armond was conductor; that he had a full crew of hands with him for the management of his train; that Brevord, as telegraph operator, had nothing to do with the actual management or movements of the train; that his connection was alone with Garrett, as the immediate superior of plaintiff, in the matter of furnishing orders and directions for the instruction and control of De Armond in his business as conductor; and that, in point of fact, his employment did not associate him with De Armond in the control and management of his train,—then, in such case, De Armond and Brevord are not, in legal contemplation, in the same department of the common employer, and are not fellow-servants; and if you so find, I charge you that the risk of injury from negligence on the part of Brevord is not such a risk as the law places upon De Armond by reason of his employment as conductor." The language quoted is assigned as error by the railroad company.

We are of opinion there is nothing in it of which the railroad can complain. Stripped of some unnecessary words, and taken in connection with other portions of the charge not excepted to, it is a correct statement of the law under the qualifications of the rule adopted and adhered to by this court. It is with us well settled, whatever may be the rule in other states, that the servant does not assume the risk of the negligence of another servant, where the latter is engaged in a different department of the work or service; as, for instance, the train crew do not take risk of the negligence of the track or section hands; nor where the negligent servant is the superior, permanently or temporarily, of the injured one, having authority to direct or control the latter, does the rule apply: *Haynes v. East Tennessee etc. R. R. Co.*, 3 Cold. 222; *Nashville etc. R. R. Co. v. Carroll*, 6 Heisk. 347; *Knoxville Iron Company v. Dodson*, 7 Lea, 367; *Nashville etc. R. R. Co. v. Wheless*, 10 Id. 741; 43 Am. Rep. 317; *East Tennessee etc. R. R. Co. v. Collins*, 85 Tenn. 827; and others might be cited; see also *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 377.

Under the proof in the case at bar,—indeed, from the lips of the superintendent, T. W. Garrett,—we have it that "the telegraph operator is the agent through which we transmit orders from the superintendent's office for the movement of trains; he merely receives and conveys; he is the medium or

the mouthpiece for the transmission of orders from this office to the train-men, or person in charge of the train."

It is manifest that the operator is not in the same department with the train-men, nor engaged in the same branch of the common employer's service. And while he may not be said to be in person the superior of the train-men to whom he delivers orders, as he, of his own motion, has no right or power to issue orders, he is in a sense the superior, for he is the arm or mouthpiece of the train-dispatcher or superintendent,—in a qualified degree a vice-principal.

It is immaterial that these men are hired and paid by a common employer, and that they are engaged in the effort to accomplish a common result, to wit, the movement of trains. That argument, if pressed to its logical conclusion, would obliterate all distinctions among those engaged in railroad business, from the president down to the humblest servant, and would practically exempt the company from all liability to those in its service.

It may be interesting to mention that the modifications of the common-law rules as to the liability of master for negligence of a fellow-servant which have been adopted by the decisions in this state are the same in principle as those since embodied in the employer's liability act passed by the English Parliament in 1880, so that the decisions of the English courts which we refused to follow have since been abrogated by the English statute.

It was said by the supreme court of North Carolina in a recent case: "No definition of the term 'fellow-servant' applicable to all cases had yet been adopted in this country by the courts, and probably could not be. So variant were the relations between master and servants in different employments, and so close the line of demarkation between co-laborers and middle-men, that each case would have to stand upon its own facts": *Dobbin v. Richmond etc. R. R. Co.*, 81 N. C. 446; 81 Am. Rep. 512.

Where there is any controversy as to the facts, the question is one for the jury, upon a proper charge of the court: See *Indianapolis etc. R. R. Co. v. Morgenstern*, 106 Ill. 216.

That a train-dispatcher is not a fellow-servant with a brakeman has been adjudged by the supreme court of Wisconsin: *Phillips v. Chicago etc. R'y Co.*, 64 Wis. 475.

To the same effect is *Dorrigan v. New York etc. R'y Co.*, from the supreme court of Connecticut, reported in 24 Am. Law

Reg., N. S., 452, as also in *Sheehan v. New York Central etc. R. R. Co.*, 91 N. Y. 332, where a train-dispatcher is held not to be a fellow-servant with any of the train crew.

So it will be seen that we are not by any means alone in the conclusion to which our own decisions necessarily lead us in this case.

We deem it unnecessary to notice at length the insistence of counsel for plaintiff in error that De Armond was guilty of gross negligence in contenting himself with the inspection of a telegram that upon its face did not concern the movements of his train, and in moving on after he saw the red light, until he had received something more definite from the telegraph operator, and that he was also negligent in the rate of speed at which he was running at the time of the collision. It is sufficient to say that at most he was guilty only of contributory negligence, which has been properly considered by the jury in abating the amount of the recovery, as is shown by the verdict, which is only for three hundred dollars.

The negligence of the telegraph operator in not delivering the proper orders was the prime and proximate cause of the injury beyond all question.

Let the judgment be affirmed.

FELLOW-SERVANTS, WHO ARE: See *Lansville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 142, and note; *Krogg v. Atlanta etc. R. R. Co.*, 77 Ga. 202; 4 Am. St. Rep. 79, and note; *Theleman v. Moeller*, 73 Iowa, 108; 5 Am. St. Rep. 663, and note; in which cases and notes it is held that one is not a fellow-servant with another who is engaged in a different department of the work or service, or who is a superior, exercising supervision of the other in his employment. In the note to *Krogg v. Atlanta etc. R. R. Co.*, *supra*, are cited cases in which it is held that a train-dispatcher, or a station agent whose duty it is to see that tracks are clear, is not a fellow-servant with a train-man.

RULE THAT MASTER IS NOT LIABLE FOR INJURY FROM NEGLIGENCE OF FELLOW-SERVANT does not apply where the servants are not co-equals: *Lansville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 142, and note.

SHADDEN v. McELWEE.

[86 TEXASER, 146.]

PLEADING. — IN SLANDER, while matters averred in a special plea may be taken advantage of in a plea of not guilty, the special plea may properly be interposed where the occasion of speaking or publishing the alleged slanderous words furnishes a defense to the action.

SLANDER. — A WITNESS UNDER OATH IN A JUDICIAL PROCEEDING IS, AS TO HIS STATEMENTS SO MADE, ONLY CONDITIONALLY PRIVILEGED. If one avail himself of such position to maliciously answer, with a knowledge that his answer is not pertinent or relevant, the law withdraws the protection it would otherwise afford; but malice in fact must be shown by the plaintiff in an action based on such defamatory statements.

SLANDER — QUESTION FOR JURY. — The question of good faith of witness in action for slander imputed to him from using alleged defamatory words as such witness, and whether the statements were employed for the purpose of slander, is for the jury.

Sam Epps Young and E. E. Young, for the plaintiff.

L. A. Gratz, and Nelson and Bush, for the defendant.

FOLKES, J. This is an action for slander.

The words as charged in the declaration are: "He [meaning plaintiff] stole my horse"; and "he [meaning plaintiff] came to my house while I was away, and stole my horse"; and "he [meaning plaintiff] is a rogue; for he stole my horse, and I did not see him back for days."

The defendant pleaded the general issue, and in addition thereto pleaded that the words, if spoken, were uttered as a witness under oath, in a cause pending in the circuit court of Roane County, wherein the plaintiff here was plaintiff there, and defendant here was defendant there; and that as such witness, replying to questions propounded to him, his answers were privileged.

While the matters set out in the special plea might have been relied on under the plea of not guilty, the defendant might properly have interposed the special plea in a case where the occasion of the speaking or publishing furnishes a defense to the action: *Dunn v. Winters*, 2 Hun, 513.

To this special plea the plaintiff replied that the words were not spoken in response to questions propounded to him, but were maliciously injected into the testimony voluntarily and falsely, and were not pertinent to the issue in said suit, but were spoken for the purpose of defaming and injuring plaintiff.

To this replication there was a demurrer, to the effect that

"it was immaterial to the validity of the defense set up in the special plea whether the words spoken by the defendant concerning the plaintiff, as a witness, under oath, in a judicial proceeding, were uttered, though not in answer to any question; neither is it material whether or not they were spoken maliciously and voluntarily. In neither event can defendant be held liable therefor," etc.

The demurrer was presented under several heads, but the substance and effect of them all is contained in the language above quoted.

The circuit court sustained the demurrer, and the plaintiff, declining to further reply, the suit was dismissed, and plaintiff has appealed in error.

The judgment of the circuit court is erroneous, and must be reversed.

It is insisted on behalf of the defendant that it is not a matter between individuals, but concerns the due administration of justice, that a witness should be allowed to speak, according to his belief, the truth, without regard to consequences, and should be encouraged to do this by the consciousness that his utterances are absolutely privileged, leaving him only liable to indictment for perjury if he speaks other than the truth; that witnesses should not be hampered while on the stand with fears of a suit for damages.

Mr. Townshend, in his work on slander and libel, page 387, third edition, says this is the view in the courts of England and some of the states, and the author lends the weight of his own opinion thereto.

While plausible, it is, in our opinion, unsound. The act of testifying as a witness must be either in the exercise of a right or the performance of a duty, and in either case the act must be performed in good faith. If he avail himself of his position as a witness to maliciously answer, with a knowledge that such answer is not pertinent or relevant, the law withdraws the protection it would otherwise have afforded him.

Where the defendant, a witness, was asked if a certain person was attended by a physician, his answer was, "Not as I know of; I understood he had a quack,—I would not call him a physician." In an action brought for these words, it was held proper to charge the jury that if they "believed, from all the circumstances proved, from the questions put, from the manner of answering, and from the answers themselves, that the defendant testified in good faith, or in the belief that

his answers were pertinent or relevant, then the law protected him; but if the defendant was actuated by mere malice, and used the words for the mere purpose of defaming the plaintiff, then the law withdrew the protection it would otherwise have afforded him": *White v. Carroll*, 42 N. Y. 161; 1 Am. Rep. 503; *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 32 Me. 442.

It follows, of course, that the witness is not liable if the answers are pertinent and responsive; or, as it is expressed in some of the cases, the relevancy of the words complained of to the matter at issue is the test of the privilege.

In Odger's Digest of the Law of Libel and Slander, page 191, a much later work than that of Mr. Townshend, it is said: "A witness in the box is absolutely privileged in answering all questions asked him by counsel on either side; and even if he volunteers an observation (a practice much to be discouraged), still if it has reference to the matter in issue, or fairly arises out of any question asked him by counsel, though only going to his credit, such observation will also be privileged. But a remark made by a witness in the box wholly irrelevant to the matter of inquiry, uncalled for by any question of counsel, and introduced by the witness maliciously for his own purposes, would not be privileged, and would also probably be a contempt of court."

Such seems to be the rule also in Wisconsin and Massachusetts: *Calkins v. Sumner*, 13 Wis. 193; 80 Am. Dec. 738; *McLaughlin v. Cowley*, 127 Mass. 316.

While we have no reported cases in our state with reference to the privilege of a witness, there are adjudications concerning judicial proceedings, and the privilege afforded thereunder, which are in harmony with the conclusions here reached.

In *Lea v. White*, 4 Sneed, 111, the words complained of were used in a return to a *habeas corpus*, imputing insolvency and inability to support two free colored children, under covenant of indenture; that said children were cruelly neglected and maltreated, and that there was reason to believe that the petitioner would sell them into slavery. This court said: "There are many occasions upon which the legal presumption of malice, from the fact that the words are defamatory, does not arise. The communications are, on account of the occasion on which they are made, *prima facie*, or, as the books have it, 'conditionally privileged'; that is, they do not amount to defamation until it appears that the communication had its origin in actual malice in fact." In such cases, it will be incumbent

on the plaintiff to show, in addition to the injurious publication, a malice in fact, and that the occasion was seized upon as a mere pretext."

It is perhaps needless to add that where the matter alleged is pertinent to the issue, or fairly supposed to be so, although not in the strictest sense relevant, the pleader is absolutely privileged, although he may have also entertained sentiments of malice to the adverse party.

The court, in this case, further held that "the question whether there be or be not reasonable or probable cause may be for the jury or not, according to the particular circumstances of the case." The pertinency of the matter to the occasion is that which is meant by probable cause. In that case, it was held that whether the matter there complained of could reasonably have been thought by the defendant necessary to his defense was properly a question for the court, and that it was within the class of absolutely privileged communications, and therefore not actionable.

In *Buohs v. Backer*, 6 Heisk. 404-407, the doctrine of *Lea v. White*, *supra*, is reaffirmed. It was a case where Buohs was sued in libel by a young girl, of whom he had written, in a petition to the county court as next friend for certain minors for the removal of their guardian, that "said guardian has had in his family a girl, who is now probably over sixteen years of age, who came to live with him at about the age of thirteen, and has remained in his family ever since. Her reputation is ruined, and she is now an example of shame and prostitution." The plea was, that the words had been used in judicial proceedings, in good faith and without malice. The trial judge had charged the jury that, as the plaintiff was no party to the suit, the communication could not be privileged, and there was a verdict and judgment for five thousand dollars. The cause was reversed in this court for error in said charge, and in not charging, as requested, that express or actual malice must be shown on the part of the petitioner in that cause.

The well-known distinction between absolutely privileged communications and those only conditionally so is well stated in the case just referred to.

Again, in *Davis v. McNeese*, 8 Humph. 40, Judge Green delivering the opinion of the court, in reversing the judgment of the court below, said: "Whether the words that were spoken were used in the legitimate defense of himself, or were em-

ployed maliciously as a means of abuse and slander of McNees, should have been left to the jury."

This was a case where the prosecutor was told by the magistrates, who had just adjudged the proof insufficient to convict the defendant of perjury, that they would have to tax him with the costs. The prosecutor replied that he did not see how they could do that, "as the defendant had sworn falsely, and he had proved it." It was for the use of this language, under these circumstances, that the suit was brought, with the result above stated.

We recognize fully the importance to a due administration of justice, of upholding the privilege accorded parties to write and speak freely in judicial proceedings; but in so doing, we must not lose sight of the fact that it concerns the peace of society; that the good name and repute of the citizen shall not be exposed to the malice of individuals, who, under the supposed protection of an absolute privilege, make use of the witness-box to volunteer defamatory matter in utterances not pertinent. To hold such persons responsible in damages cannot fairly be said to hamper the administration of justice. The privilege of a witness is great, and will be protected in all proper cases; but it must not be mistaken for unbridled license. It follows that the truth or falsity of the matters alleged in the replications in this case, involving the good faith of the defendant in using the words imputed to him in the defense of himself, or whether they were employed as a means of abuse and slander of the plaintiff, should have been submitted to the jury with proper instructions. That this may be done, the judgment is reversed and cause remanded.

WORDS USED IN COURSE OF TRIAL WILL NOT, IN ABSENCE OF MALICE, confer right of action for slander or libel: Note to *McMillan v. Birch*, 2 Am. Dec. 431-433. And see, as bearing on this point, the discussion of the liability of counsel for words used in the course of a trial, the note to *Stackpole v. Hennen*, 17 Id. 194, 195. In *Foster v. Kennedy*, 38 Ala. 359, 81 Am. Dec. 49, and *Calkins v. Sumner*, 13 Wis. 193, 80 Am. Dec. 738, and notes to both cases, the general rule is laid down that words spoken or written in the course of judicial proceedings, though irrelevant, are privileged, in the absence of malice. As to words used by a witness, however much actuated by malice or ill-will, it is held that he will not be held answerable in damages, if they were pertinent and material to the issue: *Calkins v. Sumner*, *supra*, and note.

ACTIONS FOR SLANDER CONSISTING OF STATEMENTS MADE ON WITNESS-STAND. — Under the English rule, a statement made by witnesses in the course of a judicial investigation is a privileged communication to the extent

that no action of slander will lie therefor: Folkard's *Starkie on Slander and Libel*, Wood's Notes, 262, sec. 201; *Henderson v. Broomhead*, 4 Hurl. & N. 569; *Revis v. Smith*, 18 Com. B. 126; Townshend on Libel and Slander, sec. 223. The rule in this country has, however, been qualified, and it is the purpose of this note to consider in brief the principal limitations thereto. It will be observed that the statement made by Townshend in his work on libel and slander, as to the law upon the point involved, is criticised somewhat freely in the principal case. In *Hutchinson v. Lewis*, 75 Ind. 55, 60, it is said, quoting from section 223 of Mr. Townshend's work, that "the due administration of justice requires that a witness should speak, according to his belief, the truth, the whole truth, and nothing but the truth, without regard to the consequences; and he should be encouraged to do this by the consciousness that, except for any willfully false statement, which is perjury, no matter that his testimony may be in fact untrue, or that loss ensues to another by reason of his testimony, no action for slander can be maintained against him." This is a correct statement of the law upon this subject; citing 1 Hilliard on Torts, 322; Cooley on Torts, 210; *Nelson v. Bobe*, 6 Blackf. 204; *Grove v. Brandenburg*, 7 Id. 234; but the court qualifies the rule, however, by adding in effect that the words must be pertinent and material. Substantially the same qualification is made in *Mower v. Watson*, 11 Vt. 536, 34 Am. Dec. 704, where it is declared that witnesses are privileged, provided what is spoken be in the ordinary course of proceedings and *bona fide*; but the case of *Callins v. Sumner*, 13 Wis. 193, 80 Am. Dec. 738, cited also in the principal case, holds that an action for slander will not lie against a witness, if what he said was pertinent and material to the issue, no matter how much he may be actuated by hatred or ill will. Another case where this question arose is that of *Liles v. Gaster*, 42 Ohio St. 631, 636. There the court says: "The general rule is, that language used in the ordinary course of judicial proceedings, whether by the judge, a party, jurors, or witnesses, is protected, if it be relevant to the matter under consideration, and the court has jurisdiction. The privilege accorded to a witness under such circumstances is founded on public policy. The due administration of justice requires that a witness should be perfectly free to speak according to his belief, without regard to consequences. He is sworn to tell the truth, the whole truth, and nothing but the truth concerning the matter in trial. While doing so in good faith he is absolutely privileged. . . . 'We unhesitatingly recognise the fact that in many cases, however damaging it may be to individuals, there should and must be legal immunity for free speaking, and that justice and the cause of good government would suffer if it were otherwise. . . . What would be the condition of the witness, for instance, were he under the necessity of calculating when giving his testimony, not merely whether it satisfied his conscience, but also whether he could prove it to be true should he be sued in slander for giving it? It is beyond doubt that to subject him to such responsibility would at least detract largely from the reliability of evidence, and multiply the opportunities for operating upon the fears of witnesses, to the serious detriment of justice'; Cooley on Torts, 211. . . . Malice in fact or express malice . . . does not render the words of a witness who testifies in good faith, to matters deemed by the court wherein he is testifying to be admissible, actionable, even though the testimony be irrelevant to the issue. If the witness in such case believe his statements to be true, though in fact they are false, malice in fact will not render him liable in damages." These words are certainly forceful, and imply a stronger leaning towards the English rule than is perhaps intended, judging from what is

subsequently added by the court; for it concludes as follows: "What his liability in this respect may be, if he was guilty of intentional falsehood and actual malice, we need not here determine, as the case does not require it. Neither does it require us to determine such liability if a witness disregard the obligations of his oath, and willfully and maliciously perverts the truth, and takes advantage of his position to utter false, malicious, and slanderous words. Whether in such cases a witness is liable only to an indictment for perjury, as many authorities hold, or may also be liable to a civil action, as others maintain, is a question not now before us": *Id.* 636, 637.

The tendency in Louisiana, as indicated by the case of *Burke v. Ryan*, 36 La. Ann. 951, is in the same direction as the decision in the principal case, since the Louisiana case thus declares the law of that state: "It needs no elaborate reference to authorities to establish the proposition of law that witnesses who appear in a court of justice discharge a public duty; that though they be liable to a prosecution for perjury should they commit such, they are not responsible in a civil action for any reflection thrown out in delivering their testimony, or for anything said or published by them in the course of a judicial proceeding, even if the statement be false, malicious, and without probable cause. There is put this qualification, however: that statements thus made in the course of an action must be pertinent and material to the issue"; citing *Starkie on Slander*, 242-254; *Townshend on Libel and Slander*, secs. 209, 223, 354, 355, and note; 2 *Addison on Torts*, sec. 1092, pp. 933-935; *Odgers on Slander*, 186-192. The case of *McLaughlin v. Cowley*, 127 Mass. 316, cited in the principal case, merely holds that the exception is as above stated, viz., that the answer to be privileged must be pertinent and material to the issue, and this case relies upon *Rice v. Coolidge*, 121 *Id.* 393, 395, where the court says: "It seems to be settled by the English authorities that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings: *Henderson v. Broomhead*, 4 Hurl. & N. 569; *Reis v. Smith*, 18 Com. B. 126; *Dawkins v. Rokely*, L. R. 8 Q. B. 255, and cases cited, affirmed L. R. 7 H. L. 744; *Seaman v. Nethercliff*, 1 C. P. D. 540. The same doctrine is generally held in the American courts, with the qualification as to parties, counsel, and witnesses, that in order to be privileged, their statements made in the course of an action must be pertinent and material to the case: *White v. Carroll*, 42 N. Y. 161; 1 *Am. Rep.* 503; *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 32 Me. 442; *Kidder v. Parkhurst*, 3 Allen, 393; *Hoar v. Wood*, 3 Met. 193. In the last-cited case, Chief Justice Shaw says: 'We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as to impute crime to another, and therefore if spoken elsewhere would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry.' . . . The reasons why the testimony of witnesses is privileged are, that it is given upon compulsion, and not voluntarily, and that in order to promote thorough investigation in courts of justice, public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony." The case of *White v. Carroll*, 42 N. Y. 161, 1 *Am. Rep.* 503, cited in the last case as supporting the doctrine there stated, only decides, however, that it is a question for the jury to determine whether answers given by a person in the course of his testimony as a witness, and claimed to be slanderous, were so given under the belief that they were pertinent and relevant to the question at issue or from malice.

A limitation of the rule that the statements must be pertinent and material is, that a witness is not answerable in damages for any statements he may make to questions put to him, and which are not objected to and ruled out by the court, or concerning the impertinency or propriety of which he receives no advice from the court or tribunal before which the proceeding is had; that is, if the alleged slanderous matter be irrelevant, yet if it is called out by questions put by counsel to the witness under the above circumstances, the witness is protected: *Callins v. Sumner*, 13 Wis. 193; 80 Am. Dec. 738.

AS TO PRESUMPTIONS AND THE BURDEN OF PROOF IN SUCH CASES, the rule is, that a presumption attaches that the words spoken by a witness on the stand are pertinent and material: *Hutchinson v. Lewis*, 75 Ind. 55, 60; *Liles v. Gaster*, 42 Ohio St. 631; and also that they were fairly called out by the examination: *Liles v. Gaster*, Id. It is also declared that words spoken in judicial proceedings, though actionable *per se*, are *prima facie* privileged, and that it is incumbent upon the party alleging that they are slanderous to overcome the presumption in favor of the witness, and to aver and show that they were not pertinent or material, and that the speaker was animated by ill will and hatred, and took advantage of the privilege accorded him in law as such witness; malice in fact must be averred and proved. Courts will to this extent protect the witness, even in cases where such actions are favored: *Callins v. Sumner*, 13 Wis. 193; 80 Am. Dec. 738; *Liles v. Gaster*, 42 Ohio St. 631.

SULZBACHER BROTHERS v. BANK OF CHARLESTON.

[66 TENNESSEE, 201.]

PROTESTING FOREIGN BILL OF EXCHANGE — EVIDENCE. — If a notary presents such bill for payment in business hours, at the usual place of business of acceptor, and finds it closed, no explanation being furnished as to why it is closed, he may protest the bill for non-payment, except in case of permanent abandonment and removal to another place of business. It is not incumbent upon him, in such case, to call at the acceptor's residence, and the notary's certificate embodying a statement of such facts is sufficient.

NOTARY'S PROTEST OF FOREIGN BILL OF EXCHANGE PRESENTED FOR PAYMENT IS NOT CONCLUSIVE, but only evidence of such facts as are proper to be stated in it; it may always be rebutted by other evidence showing how the demand was made, or that proper diligence was not used to make it, or that there was a permanent abandonment and removal to another place of business in the same city.

BILL OF EXCHANGE. — SAME DEGREE OF DILIGENCE DOES NOT ALWAYS DEVOLVE UPON NOTARY in case of presentment for payment as in case of presentment for acceptance.

N. D. Malone, for the plaintiffs.

Oolyar, Marks, and Childress, for the defendant.

FOLKES, J. This is a suit brought in the circuit court of Davidson County by the bank, as the holders for value, in due course of trade, of a draft or bill of exchange drawn by

the plaintiffs in error, at Nashville, on December 2, 1882, for \$892.95, payable thirty days after date to the order of the drawers, addressed to Keller and Rushing, Charleston, South Carolina, indorsed by Sulzbacher Brothers, and accepted by Keller and Rushing.

The draft was drawn to cover the amount of a bill of goods sold by the drawers to the acceptors, and was by the bank discounted for the benefit of the drawers. The paper, not being paid at maturity, was protested.

The question which we are to consider is as to the sufficiency of the notarial certificate with reference to the demand for payment. The following is a copy of so much of the certificate as is necessary to be noticed:—

“I, Haywood Thayer, notary public, . . . exhibited the original draft . . . at the place of business of Keller and Rushing, the acceptors, and demanded payment of the same, but found it closed, and no one there to respond to demand, which was thereby refused; whereupon I made out notice,” etc.

The contention on behalf of the plaintiff in error is, that it was necessary for the notary, upon finding the place of business of the acceptors closed, to have gone to their residence, or to have made further inquiry and effort to find them. Failure to do this, it is insisted, discharged the drawers.

Can this contention be sustained? We think not. Being a foreign bill of exchange, the protest must show upon its face all the facts necessary by the law merchant to charge the drawer and indorsers. And while the protest is not conclusive, but only evidence of such facts as are proper to be stated in it, it may always be rebutted by other evidence showing how the demand was made, or that proper diligence was not used to make it.

With the protest before us, and the presumption that the notary, as a public officer, has done his duty on the one hand, and from the proof offered in rebuttal on the other, the inquiry always is, Has due diligence been used by the notary, under all the circumstances, to find the party and make the demand?

Let us apply this test to the facts of this case. The language of the certificate we have already seen. The only proof in the record which it is contended tends to rebut the presumption in favor of the sufficiency of the notarial act is, that the acceptors had “suspended,” and “had made a second

mortgage," shortly before the maturity of the bill; from which it is argued that their place of business had been abandoned, and that, if the officer was not required ordinarily to go to the residence when the place of business is temporarily closed, or the parties absent, he would have to do so when the parties had ceased to have any place of business.

In the first place, it is proper to reply that the proof does not show that the acceptors had ceased to have and use a place of business. There is nothing to show the character, nature, or extent of their suspension. The only witness who speaks on this subject is a bank officer, who says they had "suspended"; that the bank had appropriated a small balance to their credit on deposit to the payment in part of a debt due by them to the bank; and that they had made a second mortgage to secure an indorser on a note held by the bank, under which property embraced therein was sold, and proceeds applied to the payment of the note.

All of this may be perfectly consistent with the retention by them of their old place of business, either for the continuation of business or in winding up their old business. Indeed, the term "suspended," in the connection in which it is used, would ordinarily mean a suspension of payment, an embarrassed financial condition, but not necessarily a cessation of business, and a removal from the old stand.

Had the facts been as now assumed in the argument on behalf of the drawers, it would have been a very easy matter for them to have made the proof, the accessibility and admissibility of which is unquestioned.

We are of opinion that if a party has closed in the sense of an abandonment of his place of business at the maturity of the paper, but has a residence or other place of business in the city which could be ascertained by reasonable inquiry, a presentment at the former place of business would not be sufficient.

But unless it is shown that he has abandoned or permanently closed it, it is his duty to keep some one there to answer business demands during business hours; and the statement of the notary's certificate that he called at the place of business of the acceptor to make demand is sufficient; and the presumption is, that the demand was made in business hours: *Baumgardner v. Reeves*, 35 Pa. St. 250; *Wiseman v. Chiapella*, 23 How. 368.

In this latter case there is a very full and instructive dis-

cussion of the question by the court, in the course of which it is said: "Merchants usually register their acceptances in a bill-book, and it cannot be presumed that they are unmindful of the days when they are matured. Should their counting-rooms be closed on such days, the law will presume that it has been done intentionally to avoid payment, and on that account that further inquiries need not be made for them before protest can be had for non-payment."

Continuing, they say: "Cases can be found, and many of them, in which further inquiry has been deemed proper, and a failure to make which has been deemed want of due diligence; but the rulings in such case will be found to have been made on account of some peculiar fact in them which does not exist in this case."

To this view the learned author of *Daniel on Negotiable Instruments*, in section 1118, lends the weight of his opinion, adding, however, that "it would be safer, perhaps, to make some further effort to find the payor when the doors are found closed, as the authorities are not uniform on this question."

We are content to take the view which holds further effort unnecessary as sound in principle and amply sustained by authority, and hold the presentment at the acceptor's place of business sufficient, where the notary finds such place closed, there being no explanation furnished as to why it was closed. It is the duty of the acceptor, who is the principal debtor, to provide for the payment of the bill; and if he is not in himself, and there is no one present to answer for him, when the holder, through the notary, calls at his usual place of business, the bill may well be treated as dishonored, and protested for non-payment.

To so adjudge in a case of presentment for payment is not to hold that the same would suffice where the presentment is for acceptance. The party is not under the same obligation to be at his usual place of business, or to have some one there to represent him in the matter of accepting drafts generally, that he is to provide for payment of bills already accepted, with the date of their maturity fixed. Due diligence might well require of the notary further efforts to find the party whose acceptance is desired.

But it is urged by counsel for the plaintiffs in error that the case of *Union Bank v. Fowlkes*, 2 Sneed, 555, is authority for his contention here.

Without quoting the general observations of the learned

judge, which, it is said, warrant the argument made, it is sufficient to call attention to the fact that, on page 559 of the opinion, Judge Caruthers says: "If the place of business be closed or discontinued, what diligence must be used, if any, to find the acceptor or his dwelling, or to ascertain that he has none, or is not himself in the city, is not a question in the case, and need not be considered."

The judgment of the circuit court, holding the drawers liable, will be affirmed, and the report of the commission of referees in all things confirmed.

PROTEST AS EVIDENCE, GENERALLY: See the extended note to *Tate v. Sullivan*, 96 Am. Dec. 602-612.

SCHRIMPF v. TENNESSEE MANUFACTURING COMPANY.

[35 TENNESSEE, 232.]

STIPULATION BY EMPLOYEE THAT BEFORE LEAVING HIS EMPLOYMENT HE WILL GIVE TWO WEEKS' NOTICE, and that if he leaves without first giving such notice he will forfeit all moneys due him, is void; and the forfeiture cannot be enforced.

Frank T. Reid, for the appellant.

Baxter Smith and Son, for the respondent.

TURNER, C. J. Plaintiff sues the defendant for twenty-eight dollars, claimed to be due for the services of his minor son, rendered under a contract made by the father. There is no dispute as to the amount. The defense is put upon a clause in the contract as follows: "Every individual desiring or intending to leave the employ of the company will be required to give two weeks' notice, and his other engagement with the company will not be considered fulfilled until he or she has worked out such notice; and should any person leave the employ of the company without giving and working the two weeks' notice required, it is agreed by both employer and employee that whatever may be due at the time of leaving is an indebtedness to the company, to be considered as liquidated damages for such failure to carry out the contract as made."

The son quit without giving the notice. Wherefore it is urged the company owes the father nothing by the terms of the contract. His view of the merits of such defense is thus

expressed by Scott, J., in *Bays v. Ambrose*, 28 Mo. 39. We quote from 1 Sutherland on Damages, 479:—

“They mistake the object and temper of our system of jurisprudence, who, while maintaining that men, in making all contracts, have a right to stipulate for liquidated damages, regardless of the disproportion to the sum, resulting from a breach of the contract, insist that it would be hard if men were not permitted to make their own bargains. No system of laws would command our respect or secure willing obedience which did not, to some extent, provide against the mischief resulting from improvidence, carelessness, inexperience, and undue expectations on one side, and skill, avarice, and a gross violation of the principles of honesty on the other. The folly of one making a wild and reckless stipulation will not justify gross oppression in another. A just man, when he sees one in a situation in which he is prepared to make a contract which must grind and oppress him, will not take advantage of his state of mind, and enrich himself by his folly and want of experience. It has been remarked that, in reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty in case of his omission to do a particular act,—the real object of the parties being the performance of the act,—that if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury of the other party.”

As we have seen, the services were rendered by a minor. We may justly infer the father was in a situation to make a contract which might grind and oppress him. We may also conclude that he has engaged to suffer a loss disproportionate to the injury to the other party. Nay, more: we may say he has agreed to suffer a loss when no injury has resulted to the other party, as none is claimed. The refusal to pay is purely because it is so provided in the bond.

There is nothing to show how long the child has labored to create the debt sued for. If the contract is enforceable at all, it is so for a failure of an hour as well as the two entire weeks. If the company had been indulged for twelve months in making payments, all could be taken for the two weeks, or any particular part thereof, on failure to give notice and continue to work.

On this subject, Mr. Sutherland, volume 1, page 510, says: “The damages which may result from a mechanic’s quitting work contrary to his contract are uncertain, but every stipula-

tion purporting to fix the amount he shall forfeit or pay in such an event will not be treated as stipulated. Where the contract of hiring required that if the employee quit without giving thirty days' notice he should forfeit all wages due to him at the time of leaving, Campbell, J., said: 'We have no difficulty in holding that the injury caused by the sudden breaking off of a contract of service by either party involves such difficulties concerning the actual loss as to render a reasonable agreement for stipulated damages appropriate. If a fixed sum, or a maximum within which wages unpaid and accruing since the last pay-day might be forfeited, should be agreed on, and shall not be an unreasonable or oppressive exaction, there would seem to be no legal objection to the stipulation, if both parties are equally and justly protected.' But the facts set forth in this record do not, we think, bring the case within any such rule. The forfeiture, under the contract, covers all the wages due at the time of leaving. This is open to the objection that the employee may have been in arrears, and thus enabled to profit by his own wrong. No such forfeiture could be enforced against wages, as such, which the workman was to have paid to him before he committed any breach of his duty."

The latter case is at one with that before us, and contains our opinion of the law governing it. The rulings are simple utterances of common honesty, practical good sense, and fair dealing.

The clause of the contract pleaded in defense is void. The judgment is reversed, and judgment here for plaintiff.

ON PETITION TO REHEAR.

TURNER, C. J. The petition to rehear reargues the legal question. We are content with the holding, and dismiss the petition.

STIPULATION BY SERVANT TO FORFEIT WAGES in event of leaving service without giving two weeks' notice was held valid in *Pottsville I. Co. v. Good*, 116 Pa. St. 285; 2 Am. St. Rep. 614.

WEST NASHVILLE PLANING-MILL COMPANY v. NASHVILLE SAVINGS BANK.

[85 TENNESSEE, 252.]

CORPORATIONS. — TRANSFEREE OF STOCK IS NOT LIABLE FOR UNPAID BALANCE OF SUBSCRIPTION PRICE, where he holds as an innocent purchaser for value, without actual notice of the fact that the stock was subject to future calls for such unpaid balance.

Whitman and Gamble, for the plaintiff.

John Ruhm, for the defendant.

LURTON, J. The complainant, a manufacturing corporation created under the provisions of the general incorporation act of 1875, sues the defendant upon a stock call duly made for twenty-five per cent of subscription price upon forty-five shares of stock now standing upon the stock-books of complainant in the name of Julius Sax, president. This stock was originally subscribed by one J. B. Tucker, who paid one half of the subscription price, but to whom was issued stock certificates, one of which was in the following words:—

“Shares \$100 each.

“*West Nashville Planing-mill and Lumber Company, Nashville, Tennessee.*

“This is to certify that J. B. Tucker is entitled to thirty-five shares, of one hundred dollars each, in the capital stock of the West Nashville Mill and Lumber Company, of Nashville, subject to all the conditions and stipulations contained in their articles of incorporation; transferable by him or his attorney only on surrender of this certificate.

“In testimony whereof, the president and secretary of said company have hereunto subscribed their names.

“R. F. WOODARD, President.

“T. O. TREANOR, Secretary.”

The defendant bank, without notice that the stock was not in fact paid up, and in good faith, made a loan to Tucker, and took his stock certificates as collateral security, with usual power of attorney to transfer same. Subsequently, the bank surrendered original certificates, and caused new certificates to issue to itself, identical in form with the original. Under these facts, defendant must be treated as if an innocent purchaser for value, without actual notice of the fact that the stock was subject to future calls for unpaid balance of subscription price. A number of defenses to this suit have

been very ably and earnestly pressed by the solicitor for the bank, but in the view we take of the case, we need only determine one of them. The general rule concerning the effect of the transfer of shares in a corporation is, that such transfer operates as a novation of the contract of membership. The transferrer ceases to be a share-holder, and the transferee becomes one. The first is ordinarily relieved from all further liability to contribute capital, and loses all right to participate in the further profit or management; the transferee takes the place of the retiring member, and by implication assumes all the obligations which rested upon the former holder as a member of the company, and ordinarily becomes liable for calls to the same extent as the former owner before the transfer was made. Assuming the burdens, he becomes likewise entitled to all the benefits attaching to ownership of the shares. In the absence of charter provisions or statutory regulations, this general rule is almost universally recognized: Morawetz on Corporations, 2d ed., sec. 159, and authorities cited.

It is clearly so settled in this state: *Jackson v. Sligo M. & M. Co.*, 1 Lea, 213; *Moses v. Ocoee Bank*, 1 Id. 398.

Stockholders become such in several ways,—either by original subscription, or by assignment of prior holders, or by direct purchase from the company. It is not at all essential that at the time there is an original subscription there shall be an express promise to pay the subscription price. Oftener than otherwise there is none, the subscription being a simple agreement to take so many shares of stock. By necessary implication, there arises from such a subscription a promise to pay the par value of such stock, upon which an action of *assumpsit* lies: *East Tenn. etc. R. R. v. Gammon*, 5 Sneed, 570.

The Massachusetts and Maine cases, holding an express promise necessary, are exceptional, and are based chiefly upon the charter remedy of a sale of the stock being regarded as exclusive in the absence of an express agreement to pay. The liability of the transferee of unpaid stock is expressly put upon the same ground of an agreement by implication from the acceptance of a transfer of unpaid stock, thus coming into privity with the corporation, and by implication rendering himself liable to action by the corporation for subsequent calls for unpaid balance of subscription price: Morawetz on Corporations, 2d ed., 159; *Webster v. Upton*, 91 U. S. 65.

The Pennsylvania cases, holding that the transferee is not

liable without express agreement, are exceptional, and do not commend themselves to us by their reasoning.

The general incorporation act of 1875, under which complainant holds its charter, contains nothing which affects the question of the ordinary liability of a transferee to the corporation. Section 5 of that act only provides for the continued liability of the transferrer in the case mentioned.

As we have seen, the rule which makes a transferee liable for unpaid calls is based upon the implied agreement arising where one takes shares subject to calls, and causes them to be transferred to himself. But where the purchaser of such shares buys them as paid-up shares, and without notice that in fact they are not paid up, then no implication arises of an agreement to pay anything to the corporation for such shares. In such case there are no facts from which to imply an agreement. The representation made by the corporation, either upon the face of the stock certificate or by its officers, that the shares are paid up will, as between the corporation and such transferee, prevent any contract by implication: Morawetz on Corporations, sec. 161; Cook on Stocks, secs. 50, 257, 418.

The question arising upon the certificates in this case is not so easy of solution, inasmuch as there is no express declaration on the face of it that the shares are non-assessable or paid up. In such a case the question is a perplexing one as to whether the purchaser of such shares is bound, at his peril, to make inquiry, or whether he is not protected by the want of notice.

This certificate is in the usual commercial form of certificates issued for shares fully paid up. There is no intimation upon its face that it is not what it appears to be. The corporation, in putting such shares upon the market, has put it in the power of the subscriber to sell the same to persons innocent of the true fact. Under such circumstances, ought the corporation to be suffered to demand from an innocent transferee, for value, the balance of the subscription price? Certificates of stock are *quasi* negotiable securities. The vast number of such shares daily sold upon the market have led the courts to aid their commercial and negotiable character in favor of purchasers without notice of secret liens.

Thus an assignment of a certificate of stock is held to pass the legal title to such shares to the assignee, even without transfer upon stock-book or other notice to the corporation: *Cornick v. Richards*, 3 Lea, 1.

Again, this court held that if the pledgee of a stock certificate, with blank power of attorney, subpledge such certificate for money loaned, the subpledgee, if ignorant of the title of his pledgor, will hold the certificate as against the true owner: *Cherry v. Frost*, 7 Lea, 1.

In view of the important character assumed by shares of stock in both the speculative and investment markets, and in view of the readiness with which corporations can guard themselves, as well as purchasers of such shares, by issuing only fully paid shares, or by expressing upon the face of such as are not paid up the fact that they are subject to call for unpaid subscription price, we hold, in the interest of the negotiability of such shares and of what we deem a true public policy, that a *bona fide* purchaser of a certificate of stock, for value, and without notice, either from the face of the certificate or otherwise, that the subscription price has not been paid, will be protected as between himself and the corporation negligently issuing such shares. This rule we regard as most in accord with the usages, customs, and demands of commerce, and as calculated to prevent the assumption of unsuspected liabilities on the one hand, and the illegitimate use of unpaid shares of stock on the other: *Cook on Stocks*, secs. 50, 257.

The rule is in analogy with the principles governing contracts, as there can be no implied contract to pay unpaid calls where the purchaser buys what he is entitled to believe are paid-up shares.

The decree of the chancellor is affirmed.

LIABILITY OF SUBSCRIBERS AND STOCKHOLDERS IN CORPORATION: See extended note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 806 et seq.

TRANSFEREE FROM ORIGINAL SUBSCRIBER TO CORPORATE STOCK is substituted to his obligations as well as his rights: *Bell's Appeal*, 115 Pa. St. 88; 9 Am. St. Rep. 532, and note.

LIABILITY OF TRANSFEREE OF STOCK FOR UNPAID CALLS. — This question is considered in the exhaustive note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 806, and to the cases there considered but little can be added. The general rule as laid down in *Webster v. Upton*, 91 U. S. 65, 69, is, that there is a sufficient privity between the company and the transferee of stock, whose name appears on the company's books as a corporator, and the stock has been transferred to him thereon, to imply a promise to pay for calls on unpaid stock made thereafter; and it is urged that the same reason exists for so holding him as exists for raising up a promise by his assignor. The court relies upon the following cases in support of its statement: *Bond v. Susquehanna Bridge*, 6 Har. & J. 128; *Hall v. United States Ins. Co.*, 5 Gill, 484; *Railroad Co. v. Boorman*, 12 Conn. 530; *Huddersfield Canal Co. v. Buck*

by, 7 Term Rep. 36. But it is said that "there are very few cases, it must be admitted, in which it has been held that the purchaser of stock partially paid is not liable for calls made after his purchase." The court then refers, in this connection, to the decisions of *Casal Co. v. Sanson*, 1 Binn. 70, *Palmer v. Ridge Mining Co.*, 34 Pa. St. 288, and *Seymour v. Stargess*, 26 N. Y. 134; and reviews these cases in comparison with what is declared to be the law in *Angell and Ames on Corporations*, sec. 534, and *Redfield on Railways*, 53; and the law that such transferee is liable is extended to one who, although holding such stock as collateral security for a debt due from the assignor, has caused the same to be transferred to himself on the corporation books: *Pullman v. Upton*, 96 U. S. 323, citing the cases of *Empire City Bank*, 8 Abb. Pr. 192; 18 N. Y. 199; *Adderly v. Storm*, 6 Hill, 624; *Holyoke Bank v. Burnham*, 11 Oush. 183; *Whealock v. Kost*, 77 Ill. 296; see also *Thompson on Liability of Stockholders*, sec. 223. Where stock is duly and properly transferred by a stockholder in good faith, and such transfer is made upon the books of the corporation as required by the local state laws, this amounts to a substitution of the transferee to the liability of the old stockholder: *Isham v. Buckingham*, 49 N. Y. 216; approved in *Billings v. Robinson*, 94 Id. 415, 420; *Merrimac Mining Co. v. Levy*, 54 Pa. St. 227; 93 Am. Dec. 697. And the valid transfer of such stock to a *bona fide* purchaser vests the title in the transferee, and in the hands of such assignee holding without notice the stock is discharged of equities existing between the assignor and the corporation: *Anglo-California Bank v. Grangers' Bank*, 63 Cal. 359. The Pennsylvania case of *Messersmith v. Sharon Savings Bank*, 96 Pa. St. 440, holds that liability for an unpaid subscription does not attach to the transferee of stock. So one who is a purchaser under the *bona fide* belief that the stock is paid up, and there being nothing on the corporation books to indicate otherwise, is not liable to the company's creditors for the amount unpaid on such stock: *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496. But the transferee of hypothecated stock of a banking corporation has been held liable to all claims against the same in like manner as an ordinary stockholder: *Whealock v. Kost*, 77 Ill. 296; though the assignee is not liable for unpaid calls, in the absence of a provision therefor in the company's charter: *Palmer v. Ridge Mining Co.*, 34 Pa. St. 288. Nor can the owner of stock who has transferred the same, though not upon the corporation books, by private agreement with the transferee relieve himself from his liability due on such stock: *Bell's Appeal*, 115 Id. 88; and under a statute making both the assignor and assignee liable for accrued and accruing installments, the purchase by a broker of stock and his immediate transfer of the same does not change the legal obligation declared by the statute, and he is liable, as well as the assignee, for assessments both future and past: *McKim v. Glenn*, 66 Md. 479. That a transferee is liable ordinarily for unpaid calls is also held in *Hartford etc. R. R. Co. v. Boorman*, 12 Conn. 530; *Merrimac Mining Co. v. Bigley*, 14 Mich. 501; *Moore v. Jones*, 3 Woods, 53; *Cole v. Ryan*, 52 Barb. 168; *Boone on Corporations*, sec. 118; *Lowell on Transfer of Stock*, pp. 199, 200, sec. 187; 1 *Morawetz on Corporations*, sec. 159; in which last work it is said that the transferee "impliedly assumes all the obligations which rested upon the former holder as member of the company, and is liable for calls to the same extent as the former holder before the transfer was made"; but that a "transferee of shares cannot be held liable upon a call made before he became a shareholder in the company": *Id.*, secs. 161, 175, 176; see also, to the same effect, *Angell and Ames on Corporations*, 8th ed., sec. 534. It is also held that as between the assignor and assignee the liability for unpaid calls rests upon and is a

matter dependent upon the agreement entered into between those parties: 1 Morawetz on Corporations, sec. 161. The following Pennsylvania cases are noteworthy, in view of the criticism in the principal case: *Pittsburgh R. R. Co. v. Clarke*, 29 Pa. St. 146; *Franks Oil Co. v. McCleary*, 63 Id. 317; *Graf v. Pittsburgh R. R. Co.*, 31 Id. 489; *Aukman's Appeal*, 98 Id. 505, and cases in that state given herein, *ante*.

LOUISVILLE AND NASHVILLE R. R. Co. v. STACKER.

[85 TENNESSEE, 322.]

EVIDENCE. — In suit against railroad company for injury caused by negligence of company, and resulting in death, and the question being whether the injury caused the death or it resulted from other causes, it is error to permit witness to testify that deceased told him "he was knocked up and crippled."

NEGLECT. — RAILROAD EMPLOYEE invited on train for purpose of receiving his wages is entitled to no less care than any other person or passenger lawfully on board, so far as his safety is concerned, and where an employee who has gone upon a train for that purpose, and being old, feeble, and infirm, attempts, upon an invitation to leave, to alight therefrom while the train is slowly moving, he is not guilty of such negligence *per se* as to prevent recovery in action for damages for injury thereby sustained.

NEGLECT. — RAILROAD EMPLOYEE IS IMPLIEDLY INVITED TO LEAVE A PAY TRAIN when, after having gone upon it for the sole purpose of obtaining his wages, he is settled with, and that purpose is accomplished; in such case the leaving is to be treated as done under order of the company, unless there is some apparent danger which would make such attempt obviously imprudent and dangerous.

NEGLECT A QUESTION FOR JURY. — Where a railroad employee by invitation of the company boards a pay train to receive his wages, and being old, feeble, and infirm, attempts, at the invitation of the company, to alight from the train while it is slowly moving, and is injured, the question of contributory negligence in such case is for the jury, who should consider the rate of speed, the physical condition of the injured party, and all the circumstances.

EXCESSIVE VERDICT. — IN DETERMINING THE MEASURE OF DAMAGES for injury resulting in death, the primal inquiry is not what is the value of the life taken; it is whether and how much negligence was displayed in taking it, and whether and to what extent the negligence of the deceased caused or contributed to it; and from the reasonable and just compensation to be given upon determining the first inquiry against the negligent wrong-doer what amount should be deducted on account of the contributing fault of the deceased. In adjusting these questions, the value of the life must be in reasonable aspects estimated. The age, condition, capacity of earning money, and expectation of life should all be considered and given due weight. So where the deceased was fifty-seven years old, partially paralyzed, with limited expectation of life, his capacity to labor nearly gone, his earnings reduced to a small sum per month, his death being from apoplexy, and attended with little mental or physical suffering, and a doubt existing whether the injury caused his death, a verdict of twelve thousand dollars damages is excessive.

*Smith and Lorton, and Hughes and Hatcher, for the plaintiff
House and Merritt, and T. L. Yancy, for the defendant.*

SNODGRASS, J. On the 19th of April, 1883, the husband of defendant in error, while attempting to get off a moving train at Cumberland City, Tennessee, on the Louisville and Nashville railroad, fell, and it is alleged sustained injuries from which he subsequently died. This suit was brought by his widow for damages resulting, the amount claimed being twenty-five thousand dollars. There was a verdict and judgment against the railroad company for twelve thousand dollars, and it appeals and assigns errors.

The facts, so far as they need be stated for the determination of questions involved, are, that George Stacker, who was in the employment of the defendant company as station agent at Cumberland City, boarded a pay train to receive the amount due him for his services on the date stated. He had received and receipted for the amount due him and turned to leave the car, when the bell rang and the train started. He hurried out, and while it was still moving slowly, stepped off and fell, and, it is claimed, was fatally injured, though at the time he did not appear to be or suppose himself to be seriously hurt.

The deceased was an old man, — fifty-seven, and in declining health, — suffering from partial paralysis. He died of apoplexy; and it is insisted on the one hand that this was occasioned by the fall; on the other, that the death was not thus occasioned or hastened, and that he was not in fact injured seriously by the fall.

This was a vital issue, most seriously contested on both sides, and much evidence was introduced *pro* and *con*. Among the witnesses examined for the plaintiff was Clay Stacker, an attorney, and nephew of deceased. He was permitted to testify, over objection of defendant, that when he was sent for by his uncle, in May, to bring this suit against the railroad company, his uncle told him "he was knocked up and crippled." This was manifest error.

No other errors are assigned in the admission of testimony, and only one which we deem material to be noticed in the charge of the court predicated upon the refusal of the judge to embrace in his charge the following special instruction asked by defendant:—

"If you find that reasonable time was not given the deceased to get off the train after he was paid, then the defend-

ant would be guilty of negligence; yet the violation of this duty would not justify the deceased in exposing himself to danger in getting off the cars while in motion. And if you find that, in view of the age and physical condition of the deceased at the time, and that this condition was known to the deceased, that it was imprudent in him to undertake to get off a moving train, then this would be such contributory negligence as would defeat any recovery in this case."

The court had just given a similar charge on defendant's request, down to the effect of such contributory negligence, which he charged would be such as must be taken to diminish the damages which plaintiff would otherwise be entitled to recover. The question is, therefore, upon the facts and the request, fairly presented, whether the act of an employee of the age and in the condition of feebleness described, in attempting to leave a moving train, not being expressly ordered to do so, is guilty of such contributory negligence as defeats instead of diminishes a recovery as a matter of law.

This inquiry involves, first, the question whether, under the circumstances, the railroad company was chargeable with any less degree of care toward such an employee than it would have been toward a passenger. It is earnestly insisted, on behalf of the company, that it was not under obligation to exercise the same or an equal degree of care and diligence required in respect to a passenger. To this we cannot assent. The plaintiff was not an employee on the train. He had nothing to do with its control or operation. He was invited on board for the purpose of attention to the business for which the train was being used, and, under the circumstances, was entitled to no less care and consideration than any other person or passenger lawfully on board.

The question is, then, narrowed to the limit within which it must be determined, had a passenger, impliedly invited to alight from the train while in slow motion, done so, and sustained a fall in consequence.

It has been held in the courts of several states that such action is negligence *per se*, and that if injury results, no damages can be recovered; but this is contrary to the current of judicial opinion in this country at least. The true rule deducible therefrom is stated in 2 Wood on Railways, 1130, to be, that "in all cases the question is one of fact whether, in view of the particular circumstances, the passenger was guilty of negligence in attempting to leave the train while it was in

motion. In this, as in all other matters where the safety of the passengers is concerned, the company owes a duty to the passenger to act with proper care and caution; and if the motion of the train is not entirely stopped, and the passenger is expressly or impliedly invited to leave the train while moving at a slow rate of speed, he has a right to presume that it is safe for him to do so; and the company, having virtually told him that it was safe, is estopped from saying that the passenger was guilty of doing what it had advised him to do [or, we add, manifestly intended him to do, and have impliedly advised him under facts of this case].

"The passenger may not, in all cases, rely upon the assurance of the company in this respect, but must exercise his own judgment where there is reason to doubt the soundness of the advice; but as between a mere doubt and the experience and superior knowledge of the company's officers and agents, he has the right to give way to the latter, unless the rate of speed at which the train is moving [or, we add again, his own feebleness] is such as would prevent a man of ordinary prudence from acting upon it."

"If the train is moving slowly, and there is no obvious danger in getting off, it cannot be said to be negligence *per se* to make the attempt, especially if the passenger is directed to do so by the conductor or brakeman; and it would be error to instruct the jury that such an attempt, *per se*, constituted contributory negligence": 2 Wood on Railways, 1129.

"As a rule, it may be said that where a passenger, by the wrongful act of the company, is compelled to choose between leaving the cars while they are moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, the company is liable for the consequences of the choice, provided it is not exercised negligently or unreasonably": 2 Wood on Railways, 1131, 1132.

To the same effect are the cases cited in Thompson on Carriers of Passengers, 227-267.

The earlier cases established the rule that leaving a train in motion was such negligence as defeated the right of recovery, unless done to avoid danger of remaining on board; and this is still stated as the "general rule" in many authorities: 2 Wood on Railways, 1126; Thompson on Carriers of Passengers, 267. But the rule we have laid down is the modern one, formulated from the many exceptions, and this modification

has been before recognized by this court: *East Tennessee etc. R. R. Co. v. Connor*, 15 Lea, 258.

It will be noticed that the rule laid down in this case is in view of the fact that the deceased was impliedly invited to leave the train while moving, by the act of the company's servants in starting the train as soon as they had finished the business for which they had caused him to enter it, and upon termination of which he was expected to leave. It is not hereby intended to depart from the rule as laid down by this court in *East Tennessee etc. R. R. Co. v. Massengill*, 15 Lea, 328, that "where the party injured is not induced or directed at the time, by act or word of the company's agent, to get off, and does get off, he does so at his own risk." We merely hold, upon the facts of this case, that where the company has brought an employee aboard a pay train, to remain only until he is settled with, and for no other purpose, that such business being finished, an invitation to depart is implied, and the leaving, under the circumstances, is to be treated as done upon the order of the company.

Such being the rule, then, it was not error to refuse the instruction asked.

Upon the facts, whether or not the deceased was guilty of such negligence as would prevent a recovery should have been left to the jury; and of course in that inquiry it was proper that the jury should consider the rate of speed, the physical condition of the deceased, and all the attendant circumstances: *Thompson on Carriers of Passengers*, 267.

A third error assigned was the refusal of the circuit judge to set aside the verdict on account of excessive damages.

The court had instructed the jury that the act of the deceased in getting off the train while in motion might be looked to in mitigation of damages. Whether this was such negligence as would prevent a recovery or not, it is not a matter of controversy, under the facts, that this should not only have been looked to, but that it should have been,—as it evidently was not,—given proper consideration by the jury, and that the verdict returned was not justified by either the misconduct of the defendant, or freedom from fault of deceased, and it should not have been allowed to stand.

As this injury, if any was inflicted, occurred after the act of 1883, approved March 28th (Acts 1883, page 259), went into effect, the damages, if any recoverable, were "for the mental and physical suffering, loss of time, and necessary expenses

resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received."

There was no evidence of any wanton or grossly negligent conduct on the part of the company. At most, it was an act of carelessness, without intended, anticipated, or probable injury to any one; and the verdict, if sustained at all, must be upon the theory that it was only a fair compensation upon the terms of the statute.

It is said, and is true, that the deceased was a worthy man, and that the value of such a life—and indeed of any life—is impossible of accurate computation. It is further argued, that as the recovery may include compensation for mental and physical anguish, such suffering is not to be estimated by any rule of value, and that compensation therefor cannot be limited, and a jury is justified in going to any amount. This specious and plausible argument is unsound. In such a case as this the question is not merely what is, in fact or fancy, the value of a human life, or what amount must be taken to compensate for mental and physical suffering. These are but elements of the question. The primal inquiry is not what is the value of the life taken. It is whether and how much negligence was displayed in taking it, and whether and to what extent the negligence of the deceased caused or contributed to it; and from the reasonable and just compensation to be given upon determining the first inquiry against the negligent wrong-doer, what amount should be deducted on account of the contributing fault of the deceased. In the adjustment of these questions, of course the value of the life must be in reasonable aspects estimated, and in that connection there are some practical rules to be applied, which are sometimes called "cold calculations," because they require a dispassionate estimate of the real condition and expectation of life at the time of the injury. By whatever term, however, they may be designated, they are just, and, so far as it is practicable to do so in so delicate and difficult a question, are intended to arrive at justice.

The age, condition, capacity of earning money, and expectation of life are all to be considered; and not only considered, but given due weight in arriving at what is a fair and just result, which is and ought to be the aim and end of every litigation. In the case under consideration we have already

stated the age and feeble condition of deceased. Upright and honored as it may have been, dear as it was to him, and devoted as the evidence shows it to have been to his family, the life of deceased when injured was of very limited expectation. The evidence strongly indicates, if it does not show with reasonable certainty, that he could have lived but little longer. His capacity to labor for his family was nearly gone, and the amount he could earn for them reduced then to about twenty-five dollars per month, with probability of early incapacity to do the work necessary to secure even that. Neither his mental nor physical suffering appears to have been extraordinary, and at most it cannot be said that this evidence does not leave it free from doubt that the injury he received caused either suffering or death. While the jury was justified in concluding that it did do so, yet there is much evidence to the contrary, and it cannot be assumed to be clearly established.

Under these facts, the jury gives a verdict which, even if rendered in case of the death of a man resulting clearly from negligence of the railroad company, unmixed with any contributing fault of deceased, would be regarded as ample for compensation and punishment, to say no more. It is evident that in this case it is not a reasonable and fair compensation, and the court should have promptly set it aside. It is idle to give such a charge as was done on the question of mitigation, if such a verdict is accepted as a proper interpretation of it. It should be given with meaning, and conformity to it required, or it serves the purpose only of a harmless generality, which defendants may hope to have charged, and despair of seeing produce any legitimate beneficial result.

Juries intend to be both just and reasonable; but often inexperience in the trial of such questions, excited emotions of pity for past suffering, and sympathy with present distress, which does so much honor to our better nature under other circumstances, and so much to defeat the course of justice when operating to obscure the judgment in so serious a situation as the trial of dry issues of human right, combine to bring them to conclusions which are inconsistent with law and justice; and in such cases the judge should always interpose, and preserve the rights of parties under his more experienced and dispassionate apprehension of the law.

The judgment is reversed, and the case remanded for a new trial.

QUESTION OF CONTRIBUTORY NEGLIGENCE IS FOR JURY where the evidence is conflicting, or the inferences to be drawn therefrom are doubtful; but where the evidence is undisputed and the inferences plain, the question is for the court: *Seefeld v. Chicago etc. R. R. Co.*, 70 Wis. 216; 5 Am. St. Rep. 168, and note.

MEASURE OF DAMAGES FOR INJURY RESULTING IN DEATH: See the note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 637-641; see also *Louisville etc. R. R. Co. v. Brooks*, 83 Ky. 129; 4 Am. St. Rep. 135, and note.

FACT THAT PERSON PAYS NO FARE, of itself, does not affect duty of carrier to exercise proper care; the question in such case is merely whether the person was lawfully on the train: *Ohio etc. R. R. Co. v. Mulling*, 30 Ill. 9; 81 Am. Dec. 336.

MERCHANTS' DISPATCH TRANSPORTATION COMPANY v. BLOCH BROTHERS.

[86 TENNESSEE, 392.]

TRANSPORTATION COMPANY IS COMMON CARRIER, AND IS RESPONSIBLE AS SUCH where, although it owns no railroad itself, nor any part of the route, it employs such lines of others, acting for itself alone, as it sees fit to use, and contracts to furnish every means of transportation upon the entire journey.

LIABILITY OF COMMON CARRIER MAY BE LIMITED IN ITS EXTENT BY EXPRESS CONTRACT; such limitation must be reasonable; it must not stipulate for exemption from liability for the consequences of the negligence of the carrier, its servants or agents.

VOID STIPULATION IN CARRIER'S CONTRACT. — Where common carrier, having the whole contract for transportation, and reserving to itself the right to select its own lines, stipulates in an agreement for carriage of goods that the company alone upon whose line the goods may be lost or injured should be liable therefor, the effect of such stipulation would be to exempt such carrier from liability for the negligence of its agents, and is therefore void.

SUBCARRIER OF TRANSPORTATION COMPANY, ACTING AS COMMON CARRIER, IS ITS AGENT, and not that of consignor or consignee.

BURDEN OF PROOF IS UPON COMMON CARRIER, IN CASE OF LOSS, to show that such loss arose from a cause for which he was not responsible.

CONDITION IN BILL OF LADING — EVIDENCE. — The fair and honest acceptance of a bill of lading, without dissent, raises a presumption that all limitations contained therein were brought to the shipper's knowledge, and agreed to by him.

NO REVERSAL FOR IMMATERIAL ERROR. — **ALTHOUGH INSTRUCTIONS ARE ERRONEOUS** as to what is necessary to make a contract, yet if the contract to which they are applied is itself void, such error is immaterial, and no reversal can be predicated thereon.

Smith and Allison, for the plaintiff.

Rice and Bell, for the defendant.

CALDWELL, J. This action was brought in the circuit court of Davidson County by Bloch Brothers against the Merchants' Dispatch Transportation Company, as a common carrier, to recover the value of a certain case of merchandise. Verdict and judgment were for the plaintiffs, and the defendant has appealed in error.

The goods were received by the defendant in the city of New York, under contract to deliver them to the plaintiffs at Clarksville, Tennessee, for a stipulated sum. They were transported to Louisville, Kentucky, over several lines of railroad, in a car belonging to the defendant, and at that point they were delivered to the Louisville and Nashville Railroad Company for transportation to point of destination. The goods were never delivered at Clarksville, but were lost by the Louisville and Nashville Company, in some manner and at some time and place not shown.

The shipment was made under the following receipt and bill of lading:—

"NEW YORK, March 18, 1882.

"Received from E. S. Jaffroy & Co., in apparent good order, the following package, marked as in the margin, viz.:—

282.
Bloch Bros.,
Clarksville, Tenn.

One case mdse.

"Bill of lading from New York to Clarksville; if first-class goods, ninety-six cents per one hundred pounds.

"To be forwarded to Clarksville under the following conditions:—

"It being expressly understood and agreed that, in consideration of issuing this through bill of lading, and guaranteeing a through rate, the Merchants' Dispatch Transportation Company reserves the right to forward said goods by any railroad line between point of shipment and destination.

"It is further stipulated and agreed that, in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the happening thereof. . . .

(Signed)

"W. GEAGEN, Agent."

The contention of the defendant in the court below was, that these stipulations in the bill of lading relieved it from liability for the loss of plaintiffs' goods, and the charge of the trial judge with respect thereto is now assailed as erroneous.

The court charged that the latter of these stipulations was "rendered void" by the former; that by the former reserving to the defendant "the right to forward said goods by any railroad line between point of shipment and destination," the defendant made such railroad lines its agents, and that "the law, on grounds of public policy, would not allow it to stipulate exemption from liability for the consequences of the negligence of its agents, or their failure to do their duty."

This instruction properly treats the defendant as a common carrier. The duties which it undertakes, and which it holds itself out to the public as willing to undertake and perform, give it that character. In very many cases it has been expressly adjudged to be a common carrier, and in others, such has been assumed to be its character without a discussion of the question. We cite a few of these cases: *Merchants' Dispatch Transportation Co. v. Cornforth*, 3 Col. 280; 25 Am. Rep. 757; *Robinson v. Merchants' Dispatch Transportation Co.*, 45 Iowa, 470; *Stewart v. Merchants' Dispatch Transportation Co.*, 47 Id. 229; *Wilde v. Merchants' Dispatch Transportation Co.*, 47 Id. 247; *Bancroft v. Merchants' Dispatch Transportation Co.*, 47 Id. 262; *Merchants' Dispatch Transportation Co. v. Bolles*, 80 Ill. 473; *Merchants' Dispatch Transportation Co. v. Lysor*, 89 Id. 43; *Merchants' Dispatch Transportation Co. v. Joesting*, 89 Id. 152.

The text-writers say that dispatch companies are common carriers, and class them with express companies, because of the many points of similarity in their business, and the fact that they alike generally use the vehicles of others in the transportation of freight: *Lawson on Contracts of Carriers*, sec. 233; *Hutchinson on Carriers*, sec. 72.

No law is more familiar in England or America than that which binds the common carrier to safely deliver to the consignee goods intrusted to it for transportation, unless prevented from so doing by the act of God or the public enemy. But in the last half of a century it has become equally well settled that the common-law liability of a common carrier may be limited in its extent by express contract for that purpose.

This right of the carrier to limit its responsibility has been recognized by the supreme court of the United States since

the decision by that court, in 1847, of the case of *New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, 6 How. 344; and so far as we are informed, it is now upheld in every state of the Union. To be valid, however, the limitation must in all cases be reasonable; and to be reasonable, it must not stipulate for exemption from liability for the consequences of the negligence of the carrier, its servants or agents: *Railroad Co. v. Lockwood*, 17 Wall. 357-384; *Coward v. East Tenn. etc. R. R. Co.*, 16 Lea, 225; 57 Am. Rep. 227; *Dillard v. L. & N. R. R. Co.*, 2 Lea, 288; *Marr v. Western Union Telegraph Co.*, 85 Tenn. 529.

In the case before us, the defendant insists that, by the stipulation in the bill of lading, it is relieved from responsibility for the loss of plaintiffs' goods. We have already seen that the defendant, in the bill of lading, first reserved to itself the right of selecting the particular lines of railroad over which it should transport the goods, and left the shippers or owners no choice or discretion in that matter. This reservation, the trial judge told the jury, constituted such railroad lines, when selected, the agents of the defendant.

Following this is the other stipulation, that the company alone upon whose line the goods might be lost or injured should be liable therefor. This, the trial judge told the jury, was invalid, because the purpose of it was to exempt the defendant from liability for the negligence of those agents.

If the first of these two propositions laid down by the trial judge be true, the other would seem to follow; that is to say, if the railroad lines over which the goods were transported were the agents of the defendant, then its stipulation against its responsibility for the negligence of those agents would be invalid; for it has been seen that a common carrier cannot lawfully contract against the consequences of its own negligence, and, upon familiar principles, it can no more contract against the consequences of the negligence of its agents, because their negligence is in law its negligence.

The contract of shipment was made by the defendant in its own behalf for the whole route, and not on behalf of others, or for a part of the route only. For a specified sum, to be paid to it for the whole service, the defendant promised through transportation from New York to Clarksville, receiving the goods in its own name at point of shipment, and binding itself to deliver them at point of destination. It did not own, or claim to own, a single line of railroad, though several were to

be used in the performance of its contract. It was compelled to rely upon others for the carriage of its freight; and for its own benefit, and not for the benefit of the shippers or consignees, it reserved to itself the selection of the lines it would use, the reservation necessarily embracing the privilege, on the part of the defendant, of making its own arrangements, as to terms, with such lines, and carrying with it the duty of paying them for their services.

Such we regard as a proper interpretation of the bill of lading, down to and including the first stipulation. It shows the railroad lines engaged in the transportation of the goods sued for to have acted for the defendant, and justifies the instruction that those lines were in this litigation to be treated as the agents of the defendant.

The facts disclosed in the proof before the jury are entirely in harmony with this interpretation of the bill of lading, and justify the same conclusion of law. The goods were conveyed to Louisville in defendant's own car, and Louisville is by one of defendant's witnesses called the terminus of its line; but the manifest meaning of the witness, and the truth of the matter, is simply that defendant's car was transported to Louisville over railroad lines owned and operated by others with whom it had contracted, and that its car stopped at that point.

At Louisville the defendant engaged the Louisville and Nashville Railroad Company to carry the goods thence to their destination,—to complete its contract for it. This engagement, as the others, the defendant made on its own behalf, upon its own responsibility, and in full recognition of its undertaking and duty to deliver the goods at Clarksville. The nature of this engagement, and his appreciation of the import of this duty, is best shown by the language of defendant's agent and witness. He says: "Defendant had to forward those goods as any other shipper, and it had to pay whatever the Louisville and Nashville Railroad Company would charge, even if it had been the entire amount received from the shipper."

Dispatch companies and express companies have, since the earliest years of their existence, endeavored to put themselves without the rules of law applicable to common carriers, and to shield themselves against responsibility for the acts and omissions of other carriers whose conveyances they habitually use in the performance of their own contracts. Their efforts in this direction have been uniformly unsuccessful, because regarded by the courts as contrary to public policy.

"It has been attempted," says Mr. Lawson, "on the part of express, forwarding, and dispatch companies, to evade the responsibilities of common carriers, on the ground that they are not the owners of the vehicles employed in the transportation, but this pretense has not been permitted in the courts. The names which they assume are regarded as immaterial, the duties which they undertake being the criterion of their liability. They are, therefore, held to the responsibility of common carriers, both where they are and where they are not interested in the conveyances by which the goods are transported. If an express company engaged to transport goods sends them by a railroad company employed by it to perform the service, the railroad company becomes the agent of the express company, and the latter is liable to the consignor for its acts": Lawson on Contracts of Carriers, sec. 233.

Mr. Hutchinson, speaking upon the same subject, says: "Because of this peculiarity in the employment of the means of conveyance afforded by others, the contention has been made by these companies that they were not common carriers, but transacted their business in the character of forwarders, and were not, therefore, liable for losses occurring from the negligence of those whom they thus employed. But this claim to exemption from the ordinary liabilities of common carriers has not been sustained by the courts. These subsidiary means of transportation have been held to be the mere agencies employed by such companies, for whose acts they are strictly responsible; and the carrier whose vehicle is thus used becomes likewise liable, upon principles of agency, to the owner of the goods, according to the terms of his contract with his employer": Hutchinson on Carriers, sec. 70.

The latter author, in the language just quoted, has reference to express companies; but in the second section following he says the same rules are applicable to dispatch companies, in the same manner and for the same reasons. Here he says:—

"Other carriers, under the names of dispatch companies, fast freight lines, and the like, have also come into existence, and conduct their business upon the same principles as express companies; that is, by the employment of the means of transportation furnished them by others, and to which, for the same reasons, the same rigid rule of responsibility as common carriers is applied": Hutchinson on Carriers, sec. 72.

One of the earlier leading cases on this subject was decided

by the supreme court of Massachusetts in 1867. The defendants there were express companies. Chief Justice Bigelow, in delivering the opinion of the court, said:—

“But it is urged in behalf of the defendants that they ought not to be held to the strict liability of common carriers, for the reason that the contract of carriage is essentially modified by the peculiar mode in which the defendants undertake the performance of the service. The main ground on which this argument rests is, that persons exercising the employment of express carriers or messengers over railroads and by steam-boats cannot, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them, nor subject to their direction or supervision; and that the rules of the common law regulating the duties and liabilities of carriers, having been adapted to a different mode of conducting business, by which the carrier was enabled to select his own servants and vehicles, and to exercise a personal care and oversight of them, are wholly inapplicable to a contract of carriage by which it is understood between the parties that the service is to be performed, in part at least, by means of agencies over which the carrier can exercise no management or control whatever.

“But this argument, though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignor of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is, that the goods are to be carried to their destination, unless the fulfillment of this undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are to be carried by land or water, by the carrier himself or by agents employed by him. The contract does not imply a personal trust, which can be executed only by the contracting party himself, or, under his supervision, by agents and means of transportation directly and absolutely within his control. . . .

“The truth is, that the particular mode or agency by which

the service is to be performed does not enter into the contract of carriage with the owner or consignor. The liability of the carrier at common law continues during the transportation over the entire route or distance over which he has agreed to carry the property intrusted to him": *Buckland v. Adams Express Co.*, 97 Mass. 130; 93 Am. Dec. 68.

Some ten years later, Mr. Justice Strong delivered a very instructive opinion on the same general subject. He said: "The exception or restriction to the common-law liability introduced into the bills of lading by the defendants, so far as it is necessary to consider it, is, 'that the express companies are not to be liable in any manner or to any extent for any loss or damage or detention of such package or its contents, or any portion thereof, occasioned by fire.' The language is very broad, but it must be construed reasonably, and if possible, consistently with the law. If construed literally, the exception extends to all loss by fire, no matter how occasioned, whether occurring accidentally, or caused by the culpable negligence of the carriers or their servants, and even to all losses by fire caused by willful acts of the carriers themselves. That it can be operative to such an extent is not claimed; nor is it insisted that the stipulation, though assented to by the shippers, can protect the defendants against responsibility for failure to deliver the packages according to their engagement, when such failure has been caused by their own misconduct, or that of their servants and agents. But the circuit court ruled the exception did extend to negligence beyond the carrier's own, and that of the servants and agents appointed by them and under their control; that it extended to losses by fire resulting from the carelessness of a railroad company employed by them in the service which they undertook,—to carry the packages. And the reason assigned for the ruling was, that the railroad company and its employees were not under the control of the defendants. With this ruling we are unable to concur. The railroad company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody, either of the express companies or of the shippers or consignees of the property. That it was the agent of the defendants is quite clear. It was employed by them and paid by them. The service it was called upon to perform was a service for the defendants,—a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment.

It was neither directed by them, nor had they any control over the railroad company or its employees. It is true, the defendants had also no control over the company or its servants, but they were its employers; presumably they paid for its service, and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for the consequences of that conduct. If any one is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts become his, because done in his service and by his direction. Moreover, a common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency, but it must be subordinate to him, and not to one who neither employs it nor has any right to interfere with it.

"If, then, the Louisville and Nashville Railroad Company was acting for these defendants, and performing a service for them when transporting the packages they had undertaken to convey, as we think must be concluded, it would seem it must be considered their agent. And why is not the reason of the rule that common carriers cannot stipulate for exemption from liability for their own negligence, and that of their servants and agents, as applicable to the contract made in these cases as it was to the facts that appeared in the case of *Railroad Co. v. Lockwood*? The foundation of the rule is, that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage. It tends to induce greater care and watchfulness in those to whom an owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes more probable a failure to bestow extreme vigilance and caution upon the duty assumed, takes away the security of the consignors, and makes common carriers more unreliable. This is equally true, whether the contract be for exemption from liability for the negligence of agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant. Even in the latter case he may have no actual control. Theoretically he has; but most frequently, when the negligence of his servant oc-

curs, he is not at hand, has no opportunity to give directions, and the negligent act is against his will. He is responsible, because he has put the servant in a place where the wrong could be done.

"It is quite as important to the consignor and to the public that the subordinate agency, though not a servant under immediate control, should be held to the strictest care, as it is that the carrier himself and the servants under his orders should be.

"For these reasons, we think it not admissible to construe the exception in the defendants' bills of lading as excusing them from liability for the loss of the packages by fire, if caused by the negligence of the railroad company to which they confided a part of the duty they had assumed": *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 181.

This latter decision, which we regard as eminently sound in reason and in law, lays down the doctrine that controls the case before us.

There the undertaking on the part of the express companies was to carry certain money from New Orleans, Louisiana, to Louisville, Kentucky, and deliver it to certain banks in the latter city. The express messenger placed the packages of money in an iron safe, and placed the latter in an express-car for transportation to destination. Thus situated, the money was transported over different lines of railroad, and while being carried over the Louisville and Nashville company's line, a trestle gave way in the night-time, precipitating the express-car, which was then burned, together with the money. The express messenger who accompanied the money was rendered insensible by the fall, and continued so until the destruction was complete.

Thereafter the banks sued the express companies in the United States circuit court for the loss of the money. To these suits the express companies interposed the stipulation against liability for loss caused by fire, contained in their bills of lading, as a complete defense.

The court charged the jury that such stipulation relieved the defendants from the loss, if they and their messengers were without fault or neglect; and further, that it was not material to inquire whether or not the accident resulted from the negligence of the railroad company and its agents. In other words, the instruction was, that the defendants were liable for the consequences of their own negligence only, and not for a

loss brought about by the negligence of the railroad company. That instruction was disapproved, and a contrary doctrine announced in the language we have quoted somewhat at length.

There the contract was for through transportation, in which the defendants were obliged to use the vehicles and railroad lines of others; so it is here. There the defendants made their own employment of the railroad companies, and paid them for their services; so it is here. There the defendants produced a special contract, and by reason of it claimed that they were not liable for a loss proceeding from the negligence of the railroad company; so it is in the case before us. There the railroad company was held to be the agent of the defendants, and for the consequences of its negligence they were adjudged to be liable. We so hold and adjudge here.

A similar question was made before the supreme court of Illinois in 1879. Goods intrusted to an express company for transportation were destroyed by fire while in transit upon a railroad. The court said:—

“But admitting the conditions in the receipt were understandingly assented to by the shippers, and became a binding contract between the parties, still defendant would be liable for the full value of the goods if the loss was owing to negligence on the part of the railroad company. An express company, choosing such a corporation to do its business, will be chargeable to the same extent for the negligence of the agent employed as if the contract was primarily with such agent, on the well-recognized principle that for culpable defects in carriages used by common carriers the law makes the carrier responsible”: *Boscowitz v. Adams Express Co.*, 93 Ill. 528; 34 Am. Rep. 197.

To the same effect is *Christenson v. American Express Co.*, 15 Minn. 270; 2 Am. Rep. 122; see also *Empire Transportation Co. v. Wamsutta Oil Co.*, 63 Pa. St. 14; 3 Am. Rep. 515.

It is to be observed that all these decisions from which we have made quotations were made in cases against express companies whose messengers accompany their freight, and not in cases against dispatch companies which have no such messengers. But the doctrine therein announced, as we understand it, is not made to depend in any sense upon the presence of the messenger. The holding is, that the express company is responsible for the negligence of the other carrier upon whose line the loss or damage may occur, not because

the messenger is with the goods at the time, but because ~~and~~ other carrier is the agent of the express company.

Express companies and dispatch companies alike use the conveyances of others in the performance of their respective contracts with their respective customers; and they have precisely the same relation to those whose conveyances they so use. It is in this view that we regard those decisions applicable in this case, and it is for the reasons just stated that the text-writers class express companies and dispatch companies together.

This is not like the case of a shipment over several connecting lines of railroad, where the company first receiving the goods makes the contract for itself and others, and stipulates that liability shall fall alone upon the particular line in whose custody the goods may be when loss, if any, may be suffered. There the company first receiving the goods is in fact and by the contract a common carrier for only a part of the route,—to the end of its own line; here the defendant is in fact and by the contract a common carrier for the whole route,—from point of shipment to destination. There that company binds itself to the faithful performance of duty as a common carrier only while the goods may remain upon its line, and until delivered to the one next succeeding. To that extent and for that distance, but no farther, does it hold itself out to the consignor as a common carrier. For the balance of the route it acts only as agent of the other lines. Here the defendant holds itself out to the consignors as a common carrier for the whole route and in its own name; and for itself as principal, and not as agent of any one, contracts to furnish the necessary means of transportation upon every part of the entire journey. There the duty of transportation is divided into several parts, and each company stands as an independent carrier, bound only for safe carriage over its own line, and prompt delivery to the next in succession, or to the consignees, and it is released from liability only while the goods may be in custody of other lines. Here the defendant undertakes the whole transportation upon its own responsibility; and owning no railroad itself for any part of the route, it employs such lines of others as it sees fit to use. In making the contract with the consignors, it acts for itself alone; and in making the necessary subcontracts with such railroad lines as it chooses to employ for assistance in the performance of its undertaking with the consignors, it again acts for itself, and no one else. And though

it thus assumes for itself the duty of through transportation, and selects its own agencies, it nevertheless attempts to exempt itself absolutely from all accountability for any loss that may occur during any part of the entire transit. There the company first receiving the goods and making the contract for itself and other companies leaves each answerable under the law for any loss upon its own line, the same as if no special contract were made, and stipulates only for exemption from liability for loss upon other lines,—a liability which it could not in any event be compelled to assume against its will. Here the defendant leaves itself accountable for no loss whatever which may happen on any part of the journey; but by throwing the whole burden upon the railroad lines, its agents, it seeks to relieve itself absolutely from even a possibility of responsibility on its own part for any loss on any line. If loss be occasioned upon the first line, or upon the last line, or upon any intermediate line, the result is the same to the defendant. It has positive exemption from accountability in each and every instance, if its stipulation be sustained. It assumes the duty and receives the compensation of a common carrier, but tries to throw off all responsibility attaching to that relation and character. There the contract is reasonable, and therefore lawful; here it is unreasonable, and therefore unlawful.

Manifestly, no one of several connecting lines of railroad would be permitted to contract against accountability for a loss upon its own line; and for the same obvious reasons, this defendant, which makes such lines its agents and its own for the purposes of this transportation, as between it and the owner of the goods, should not be allowed to protect itself behind the stipulation presented in this case. Otherwise, all common carriers in the land which use the conveyances of others in the transportation of their freight and performance of their contracts with their customers may, by agreement, completely annihilate their common-carrier liability, and revolutionize the wholesome rule of law hitherto prevailing upon that subject.

Owing to the vast scope and importance of the subject, the courts and text-writers have devoted much time and space to the discussion of the power and right of connecting railroad companies to limit and extend their common-law liability as common carriers within and beyond the termini of their respective lines.

All authorities are now agreed, we believe, in holding that

the first of a number of successive companies rendering service in the carriage of freight between distant points may so bind itself to deliver goods beyond the terminus of its own line as to become responsible for their safe carriage through the entire journey; but with respect to what is necessary to constitute such a contract, the English and American authorities are quite inharmonious. The English rule is, that the receipt of goods marked for a given point, without a positive limitation of responsibility, affords *prima facie* evidence of an undertaking on the part of the carrier to safely transport them to their destination, whether within or beyond the limits of its own line; while in America, most of the courts regard each company as liable in the common-carrier capacity only for the extent of its own line, unless there be a special contract to the contrary. The latter may be stated to be the American rule, though some of the states, Tennessee among the number, have adopted the English rule, as more consonant with sound reason and public policy: Schouler on Bailments and Carriers, ed. 1887, secs. 593-598; Lawson on Contracts of Carriers, secs. 235-240; Redfield on Carriers, secs. 190, 197; Hutchinson on Carriers, secs. 145-149, 151, 152; *Louisville etc. R. R. Co. v. Campbell*, 7 Heisk. 253; *East Tennessee etc. R. R. Co. v. Rogers*, 6 Id. 143; 19 Am. Rep. 589; *Western and Atlantic R. R. Co. v. McElwee*, 6 Heisk. 208; *Louisville etc. R. R. Co. v. Weaver*, 9 Lea, 384; 42 Am. Rep. 654.

It is likewise well settled that a common carrier is not bound in law to transport goods beyond its terminus, and that it may therefore lawfully stipulate that it shall not be liable for loss after the goods have passed beyond the limits of its own line, and upon the line of another: Schouler on Bailments and Carriers, sec. 603; Lawson on Contracts of Carriers, sec. 236; *East Tennessee etc. R. R. Co. v. Brumley*, 5 Lea, 401; *Dillard v. Louisville etc. R. R. Co.*, 2 Id. 288; *Memphis etc. R. R. Co. v. Holloway*, 9 Baxt. 188; *Louisville etc. R. R. Co. v. Campbell*, 7 Heisk. 257.

But it is readily seen that this case is not controlled by either of those doctrines. It is not the case of a limitation of liability to the line of the contracting carrier, nor of an extension of responsibility beyond the limits of that line. On the contrary, it is the case of a carrier for the whole route attempting to relieve itself from liability upon any part thereof because it has no conveyances of its own, and is compelled to use those of others in the performance of its contract of shipment.

Declining to lend our assistance or approval to such an effort, we hold that the defendant, notwithstanding its stipulation, is responsible for the consequences of the negligence, if any, of the railroad companies which it employed in the transportation of the goods sued for, such companies being, to all intents and purposes, its servants or agents, as between it and the plaintiffs.

There is no positive proof that the loss resulted from the negligence of any one. But such proof is not necessary to entitle plaintiffs to a recovery; for "where goods in the custody of a common carrier are lost or damaged, the presumption of law is, that it was occasioned by his default, and the burden is upon him to prove that it arose from a cause for which he was not responsible": *Lawson on Contracts of Carriers*, sec. 245; *Hutchinson on Carriers*, sec. 764; *Schouler on Bailments and Carriers*, sec. 439; *Memphis etc. R. R. Co. v. Holloway*, 9 Baxt. 188; *Dillard v. Louisville etc. R. R. Co.*, 2 Lea, 296; *Empire Transportation Co. v. Wamsutta Oil Co.*, 63 Pa. St. 14; 3 Am. Rep. 515.

The defendant assigns as additional error the action of the court below in giving to the jury certain instructions, and in refusing certain requests for instructions, with respect to what was necessary to constitute the bill of lading a contract between the parties.

Referring to the bill of lading, and the stipulation therein, which we have already quoted and considered, his honor the trial judge to the jury said:—

"It is not a contract between the parties, unless you find that there is evidence establishing that plaintiffs agreed to that stipulation.

"Before this stipulation in the bill of lading would be binding on the plaintiffs, it would be necessary for the defendant to show that plaintiffs' attention had been called to it, and that they expressly or impliedly assented to it. The fact that they accepted the bill of lading from the defendant, kept possession of it without objection, and introduced it in evidence, would not be sufficient, in my opinion."

This charge is in accord with the uniform holding of the supreme court of Illinois, which requires the carrier to show affirmatively that the restrictions of liability claimed by it were in fact known and assented to by the shipper: *Boscowitz v. Adams Express Co.*, 93 Ill. 523; 34 Am. Rep. 191; *Field v. Chicago etc. R. R. Co.*, 71 Ill. 458; *Adams Express Co. v.*

Haynes, 42 Id. 89. But it is contrary to the great weight of American and English decisions, which hold that the fair and honest acceptance of a bill of lading, without dissent, raises a presumption that all limitations contained therein were brought to the knowledge of the shipper, and agreed to by him: 3 Wood on Railways, 1577, 1578, note 2; Lawson on Contracts of Common Carriers, sec. 102; Hutchinson on Law of Carriers, sec. 239; Schouler on Bailments and Carriers, secs. 464, 465; *East Tennessee etc. R. R. Co. v. Brumley*, 5 Lea, 404; *Dillard v. Louisville etc. R. R. Co.*, 2 Id. 294.

The requests for instruction were in substantial conformity to the rule as announced by this court in the last two cases mentioned.

This action of the court in giving the jury improper instruction upon the one hand, and in refusing to give proper instruction upon the other, would ordinarily be fatal, and afford ground for reversal; but it is not so in this case, because the error is immaterial. The matter in hand was the stipulation through which the defendant sought to protect itself against liability. It has already been seen that the court was right in telling the jury that such stipulation, though the contract, was invalid, because unreasonable and against public policy. Therefore, any error with reference to what was necessary to make it a contract was clearly immaterial. Being immaterial, a reversal cannot be predicated upon it: *Myers v. Bank of Tennessee*, 3 Head, 331; *Steinwehr v. State*, 5 Sneed, 587; *Patterson v. Head*, 1 Lea, 664.

Affirmed.

FOLKES, J., dissented; the first point being that the subcarrier was not the agent of the transportation company, and says in this connection that whatever relation existed under the proof in the record between the transportation company and such subcarrier was rather one in which the carrier was principal and the company its agent, instead of the subcarrier being the agent of the company, and argues that the company was authorized to make a contract binding the subcarrier "as to rate of freight, and to safely carry from the point of contact with" said company "to the point of destination. The railroad company was to carry on its own account, and upon its own responsibility for its own sole compensation," said company "being authorized by its contract with the shipper to select the route beyond its terminus, but when selected, the railroad became the carrier for the shipper, and not the agent for the company selecting it"; and the judge adds that "the first carrier had the right to select the second without any express reservation. . . . The fact that the contracting carrier saw fit to avoid any question of liability, as for deviation or otherwise in the selection of such succeeding carrier, does not make the latter his agent any more than if he had selected

such carrier without such stipulation." The second point of dissent was, that it was not an immaterial error to charge the jury that the shipper's attention must have been called to the terms contained in the bill of lading, and that he expressly or impliedly assented to it, and that the fact of acceptance and retaining possession of the same, and introducing it in evidence, would not be sufficient to bind him; and the judge declares that "the portion of the charge which it is claimed renders the above error innocuous follows immediately" upon the charge which is substantially given above, and is this: "But whether that be so or not, in my opinion that stipulation is rendered void by the other stipulation which preceded it, to the effect that the defendant reserved the right to forward said goods by any railroad line between the point of shipment and destination; for by that stipulation it made the forwarding carrier its agent, and the law, on grounds of public policy, could not allow it to stipulate exemption from liability for the consequences of the negligence of its agents, or their failure to do their duty"; and then concludes as follows: "How the portion last quoted can be said to cure the former, we are at a loss to see, unless it be upon the idea that two wrongs make a right, or the greater error swallows up the smaller; for in my opinion the error last quoted is greater than the former. For cases may be found in one or more of the other states to sanction the first proposition as to mutuality of contract being manifest by the signature of the shipper; but we know of no case and no principle of law that justifies the latter proposition." The third point taken up in the dissenting opinion is, that "it is too well settled now to admit of controversy that a carrier receiving freight for a point beyond its terminus may stipulate for exemption from liability for loss, however occurring, on another and distinct line, where the carriage to point of destination renders necessary the employment of several lines, and where a reduced or guaranteed through rate is the consideration for such stipulation"; citing *Railroad v. Brumley*, 5 Lea, 401; *Dillard v. Louisville etc. R. R. Co.*, 2 Id. 288; *Louisville etc. R. R. Co. v. Campbell*, 7 Heisk. 257; *M. & C. R. R. v. Holloway*, 9 Baxt. 188; and continuing, the judge adds: "But it is said that while this is so as to one railroad company receiving freight to be shipped beyond its road, the rule does not apply to a dispatch company or an express company. To this we answer, that upon principle there can be no such distinction. The rule as announced is one applied to common carriers; for as to a private carrier, he can make his own contract, and always could." The dissenting judge then holds that dispatch or express companies are common carriers, citing the unreported case of *Owens v. Adams Express Co.*, 1 Cent. L. J. 186, cited by Judge Cooper, 2 Lea, 288, and also *Southern Express Co. v. Wormack*, 1 Heisk. 265. The case of *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 177, is then distinguished, and the conclusion reached that "this case does not decide that the express company who is by contract authorized to deliver freight to another express company or to a railroad after the terminus of the express line is reached may not stipulate for exemption from loss caused by such other express company or railroad." It is then argued that the same rule as to making contracts for exemption applies to dispatch companies; and in support of this last statement the case of *Southern Express Co. v. Glenn*, 16 Lea, 472, is relied on. It is also declared that freight lines should be put on the same footing as railroads with reference to their contracts as common carriers, and the case of *Insurance Co. v. Railroad Co.*, 104 U. S. 146, is cited. The judge further says: "All the cases referred to in the majority opinion recognize the dispatch companies as common carriers in the fullest sense of the term, and make no such distinction

as is established here. They recognize the right of such companies to make the same contracts, and apply the same rules and principles in determining their liability—no more and no less—that is applied to ordinary railroad companies"; citing *Robinson v. Merchants' Dispatch Transportation Co.*, 45 Iowa, 470; *Stewart v. Merchants' Dispatch Transportation Co.*, 47 Id. 229; *Bancroft v. Merchants' Dispatch Transportation Co.*, 47 Id. 282; *Merchants' Dispatch Transportation Co. v. Bolles*, 80 Ill. 473; *Merchants' Dispatch Transportation Co. v. Lessor*, 89 Id. 43. The following cases, in addition to those noticed in this abstract of the dissenting opinion, are cited: *Illinois Cent. R. R. Co. v. Frankenburg*, 54 Ill. 83; *Evans etc. R. R. v. Androscoggin Mill*, 22 Wall. 594; *Taylor v. Little Rock etc. R. R.*, 32 Ark. 393; *Buckland v. Adams Express Co.*, 97 Mass. 120; *Christenson v. American Express Co.*, 15 Minn. 270.

COMMON CARRIER MAY BY EXPRESS CONTRACT LIMIT HIS COMMON-LAW LIABILITY as to all losses except those arising out of his own negligence, the exception being made on the ground of public policy: *Pennsylvania etc. R. R. Co. v. Railroad*, 119 Pa. St. 577; 4 Am. St. Rep. 670. Notice of entry on receipt or ticket is not of itself express contract which will limit carrier's liability: *Southern Express Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 738.

EXPRESS COMPANIES ARE COMMON CARRIERS: *Southern Express Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 738.

BURDEN OF PROVING ABSENCE OF NEGLIGENCE IS ON CARRIER: *Lindsley v. Chicago etc. R'y Co.*, 36 Minn. 539; 1 Am. St. Rep. 692, and note; *Pennsylvania etc. R. R. Co. v. Railroad*, 119 Pa. St. 577; 4 Am. St. Rep. 670.

WADSWORTH v. WESTERN UNION TELEGRAPH CO.

[86 TENNESSEE, 635.]

RIGHT OF ACTION FOR DAMAGES AGAINST TELEGRAPH COMPANY exists in behalf of person to whom telegram is sent for his personal benefit, when through negligence of the company the telegram is not promptly transmitted and delivered.

DAMAGES WHERE TELEGRAM NEGLIGENTLY FAILED TO BE DELIVERED IS FOR PERSONAL BENEFIT OF RECEIVER, AND DOES NOT INVOLVE QUESTION OF PECUNIARY LOSS.—Where a telegram was sent to a sister, containing information of the serious illness of her brother, and subsequently another one was sent informing her of his death, and by reason of the negligence of the company was not promptly delivered, and the brother was deprived of that attention at her hands which he would have received but for such negligence, and she is in consequence unable to make preparations for his funeral, she is entitled to damages for the wrong and injury done to her affections and feelings.

TELEGRAPH COMPANY IS LIABLE IN DAMAGES to the party aggrieved under sections 1541 and 1542 of the Tennessee code, and the act does not discriminate between messages appertaining to matters pecuniary merely, and those where a telegram is sent for the receiver's personal benefit.

John D. Martin, for the plaintiff.

Turley and Wright, for the defendant.

CALDWELL, J. This suit was brought in the circuit court at Memphis, by Mrs. Jennie H. Wadsworth and her husband, T. J. Wadsworth, against the Western Union Telegraph Company for failing to promptly deliver to her the following telegraphic messages:—

“MEMPHIS, October 2, 1887.

“To MRS. T. J. WADSWORTH, Byhalia, Miss.

“Your brother, Billie Howell, is in a dying condition at 105 Jefferson Street.

R. C. WALDEN.”

“MEMPHIS, October 3, 1887.

“To MRS. T. J. WADSWORTH, Byhalia, Miss.

“Mr. Howell died this morning. Advise us what to do. Will look for some one on morning train.

“R. C. WALDEN.”

It is averred in the declaration that Byhalia is about twenty-eight miles from Memphis, and that the two places are connected by direct line of telegraphic wire and railroad; that Billie Howell, a brother of Mrs. Wadsworth, one of the plaintiffs, was “seized with a mortal malady,” in the city of Memphis, on the second day of October, 1887, and that at about the hour of seven o’clock, P. M., of that day, R. C. Walden, “a friend of the family,” presented to the defendant the former of the messages just set out, written upon one of its day, or full-rate, blanks, and that it was accepted by the defendant for immediate transmission and delivery to her; that through the gross, wanton, and reckless negligence of the defendant, and in palpable violation of its duty, the message was by the defendant detained, and not delivered until about 11:30 o’clock, A. M., of the next day, and several hours after the death of Howell; that he died about 6:30 o’clock, A. M., on the 3d of October, 1887, and a few moments thereafter the second of said telegrams was presented and accepted for immediate transmission and delivery, as was the other one, and that, through the same gross, wanton, and reckless negligence of the defendant, this second message was detained, and not delivered by the defendant until about the same time the other one was delivered; that by reason of this negligence and breach of duty on the part of the defendant, Mrs. Wadsworth was prevented from attending her dying brother, and ministering to him in his last hours, and also from making desired preparations for his interment; that the messages were sent at her expense, and that she paid full toll therefor,—“to her damage ten thousand dollars.”

Demurrer was sustained, and the suit dismissed. Plaintiffs have appealed in error.

The first assignment of demurrer is, that the declaration shows no cause of action, in that it avers no pecuniary damage or personal injury; that mental suffering, unaccompanied by pecuniary injury, will not sustain an action.

Clearly the declaration discloses a case for some damage; and to this extent, it must be conceded, the action in sustaining the demurrer was erroneous.

The messages in question were couched in decent language, and were lawful in their purposes. Such being true, Walden had a legal right to send them, and Mrs. Wadsworth a legal right to receive them; and it was the plain duty of the defendant to deliver them promptly. Its dereliction of duty and violation of her legal right, as averred in the declaration and confessed in the demurrer, unquestionably gave her a right of action. "Every infraction of a legal right, in contemplation of law, causes injury. This is, practically and legally, an incontrovertible proposition. If the infraction is established, the conclusion of damages inevitably follows": 1 Sutherland on Damages, 2.

But the question most debated at the bar by learned counsel, and the one of most importance and interest in this case, is, whether or not injury to the feelings, anguish and pain of mind, occasioned by the defendant's breach of duty to Mrs. Wadsworth, can be regarded as an element of damage under the law.

In actions for personal injury, the general rule, which is too familiar to admit of citations of authority to sustain it, is, that both bodily pain and mental suffering connected therewith are to be considered by the jury in estimating the amount of damage sustained and the sum to be recovered by the plaintiff. Upon the latter element, it is very truthfully and appropriately remarked by a learned author that "the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the sufferings of each frequently, if not usually, act reciprocally on the other": 3 Sutherland on Damages, 260.

After laying down the rule as we have stated it to be, and citing some of the very many decisions adopting it, Mr. Wood says: "But we do not apprehend that the rule has any such force as to enable a person to maintain an action where the

only injury is mental suffering, as might be thought from a reading of the loose *dicta* and statements of the court in some of the cases. So far as I have been able to ascertain the force of the rule, the mental suffering referred to is that which grows out of the sense of peril, or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and the apprehension and anxiety thereby induced": Wood's *Mayne on Damages*, 74, note.

On the same subject Mr. Cooley says: "But in this country as well as in England, the ground of the recovery must be something besides an injury to the feelings and affections or a loss of the pleasure and comfort of the society of the person killed; there must be a loss to the claimant that is capable of being measured by a pecuniary standard": Cooley on *Torts*, 271.

These are the strongest statements of the rule contended for by the defendant which we have seen; and to them we give our full approval when applied to the class of cases with respect to which they are made. But they are applicable peculiarly, not to say exclusively, to actions for injury to the person, where physical injury is the sole ground of the action, and without which the action will not lie at all.

This, however, is an action on the facts of the case, which is permissible under our code, and may include all matters embraced in an action *ex delicto*, and also those proper to be considered in an action *ex contractu*.

The plaintiff, having a clear right of action for some damage, as we have already seen, may maintain her action, and recover all the damage she may show herself to have sustained by reason of the wrongful act of the defendant; and in ascertaining the amount thereof, all proven elements of damage admissible in either form of action are for the consideration of the jury.

In an action for tort, the injured party may recover such damages as result proximately and naturally from the wrongful act of the defendant, and also exemplary damages where the act was done with malice, or under circumstances of aggravation; and in an action for a breach of contract, the measure of the damages recoverable is generally the loss which the contracting parties, with all the facts before them, would have contemplated as flowing directly from its breach: 2

Thompson on Negligence, 849; Gray's Communications by Telegraph, 146.

The latter author, on the next page, says: "Neither in an action of tort nor in one of contract can a party recover damages for mental anguish alone; he can recover such damages, in consonance with the foregoing rules, at least only where he is entitled to recover some damage on another ground."

There is a large class of actions for tort in which substantial recoveries are authorized and sustained for injury to the feelings of the person suing, when the other damage is nominal merely. As instances of such actions, we mention the case of a husband suing for an injury to his wife, or for seducing or enticing her away from him, and that of a parent suing for the seduction of a daughter. In all of these cases the main element of damage, the real injury sustained, is the wound to the feelings,—the loss of service upon which the actions are technically based being but a legal fiction, and more imaginary than real: *Love v. Masoner*, 6 Baxt. 27; *Parker v. Meek*, 3 Sneed, 30; *Maguinay v. Saudek*, 5 Id. 147; *Coolley on Torts*, 224, 226, 231; 3 *Sutherland on Damages*, 744.

With respect to actions for breach of contract, Mr. Sutherland asks the question: "May damages for breach of contract include other than pecuniary elements?" and then he proceeds to say: "In actions upon contract, the losses sustained do not, by reason of the nature of the transactions which they involve, embrace ordinarily any other than pecuniary elements. There is, however, no reason why other natural and direct injuries might not justify and require compensation. Contracts are not often made for a purpose the defeating or impairing of which can, in a legal sense, inflict a direct and natural injury to the feelings of the injured party. A breach of promise of marriage is an instance of such a contract, and such considerations enter into the estimate of the damages. The action for such a cause is often referred to as an exceptional action. In a certain sense it is so; but in the particular action under consideration it is only peculiar. It is an action upon contract, and the damages allowed are such as, considering the nature and benefits of the thing promised, will be adequate compensation": 1 *Sutherland on Damages*, 156, 157.

To further illustrate and answer his question, the same author says: "Where a contract is made to secure exemption from a particular inconvenience or annoyance, or to

confer a particular enjoyment, the breach, so far as it disappoints in respect to that purpose, may give a right to damages appropriate to the objects of the contract": 1 Sutherland on Damages, 157, 158.

These are but illustrations and applications of the general rule, which we have already stated, for the estimation of damages in actions for breach of contract. They serve the purpose of showing that in the ordinary contract only pecuniary benefits are contemplated by the contracting parties, and that therefore the damages resulting from the breach of such a contract must be measured by pecuniary standards; and that where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied in the ascertainment of the damages flowing from the breach.

The case before us (so far as it is an action for breach of contract) is subject to the same general rule, and the defendant is answerable in damages for the breach according to the nature of the contract, and the character and extent of the injury suffered by reason of its non-performance.

The messages were sent for a particular purpose, which was disclosed upon their faces, and of which the defendant had full notice. That purpose was not of a pecuniary nature. There was no offer or instruction to buy or sell anything,—no proposition or promise with respect to any business transaction.

The messages were of far greater importance to the receiver than any of these. Her brother was lying at the point of death, in easy reach of her. It was information of this fact that the defendant first undertook to convey to her for a stipulated sum, and which, if conveyed promptly, would have enabled her to be with him in his last moments, and would have saved her the injury of which she complains.

Then her brother died away from her; his body needed her attention, and would have received it, as averred, if the defendant had done its duty. It was intelligence of the death which the defendant agreed, in the second place, to communicate to her.

The messages were proper in language, and lawful in purpose. She was entitled to the information they contained, and to whatever benefits that information would have conferred upon her, even though such benefits be mainly or altogether to the feelings and affections. The defendant contracted that she should have those benefits, and that she should be

spared whatever pain and anguish such information, promptly conveyed, would prevent.

By all the authorities, including our code, it was the duty of the defendant to transmit and deliver these messages "correctly and without unreasonable delay," and in failing to do so, it became responsible for all loss or injury occasioned thereby: Code (M. & V.), secs. 1541, 1542; *Marr v. Western Union Tel. Co.*, 85 Tenn. 529; Gray on Communications by Telegraph, secs. 81, 82, et seq.; Cooley on Torts, 646, 647; Wharton on Negligence, sec. 767; 3 Sutherland on Damages, 298-300; Shearman and Redfield on Negligence, sec. 605.

This rule of damages is enforced by the supreme courts of Georgia, Virginia, and other states, even where the message is in cipher: *Western Union Tel. Co. v. Fatman*, 73 Ga. 285; 54 Am. Rep. 877; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173; 46 Am. Rep. 715, and reporter's note at end of case.

It is that most of the adjudged cases in which telegraph companies have been required to respond in damages for their negligence have involved questions of pecuniary loss; but we cannot agree that, for that reason, the liability should attach and be enforced in such cases only.

Telegraphy is of comparatively recent origin; and the law concerning the duties and liabilities of telegraph companies has hardly passed its infancy, and cannot be expected, at so early a day in its history, to be settled, even in its important parts, by a long line of concurring decisions.

In addition to this, it is but reasonable to presume that such a flagrant breach of plain obligation, with respect to matters so near the heart and so accustomed to the respect of all mankind as is here averred, has but seldom occurred, and therefore has but seldom been brought to the attention of the courts of the country.

To hold that the defendant is not liable in this case for the wrong and injury done to the feelings and affections of Mrs. Wadsworth by its default would be to disregard the purpose of the telegrams altogether, and to violate that rule of law which authorizes a recovery of damages appropriate to the objects of the contract broken; and furthermore, such a holding would justify the conclusion that the defendant might with impunity have refused to receive and transmit such messages at all; and that it has the right in the future to do as it has done in this case, or at least that it cannot be required to respond in damages for doing so.

To such a result we think no court should submit. The telegraph company is the servant rather than the master of its patrons. It is their prerogative to determine what messages they will present, and so they are lawful, it is bound by law, upon payment of its toll, to transmit and deliver them correctly and promptly. It has no right to say what is important and what is not, what will be profitable to the receiver and what will not, what has a pecuniary value and what has not; but its single and plain duty is to make the transmission and delivery with promptitude and accuracy. When that is done, its responsibility is ended; when it is omitted through negligence, the company must answer for all injury resulting, whether to the feelings or to the purse,—one or both,—subject alone to the proviso that the injury be the natural and direct consequence of the negligent act.

Continuing the discussion, and as illustrative of his position as to the allowance or non-allowance of a recovery for injury to the feelings, Mr. Wood says that an action will not lie for "charging a lady with being a prostitute, or a gentleman with being a scoundrel, a black-leg, a cheat," etc., unless the charge be productive of some special damages apart from mental anguish occasioned thereby: Wood's *Mayne on Damages*, 75.

This is conceded to be true at common law, because, as stated by the same author, such offenses are not by the common law crimes in the legal sense. But if by statute the making of such charges be rendered actionable *per se*, and the injured party in that way get a standing in court, a recovery may be had for all damages sustained, including mental suffering.

In this connection, and in addition to what has already been said with regard to the right of action growing out of the defendant's breach of duty, it is to be observed that we have a statute which expressly confers the right of action. Section 1541 of our code requires telegraph companies to transmit and deliver all proper messages "correctly and without unreasonable delay"; and for a failure to do so, the defaulting company is, by section 1542, declared to be "liable in damages to the party aggrieved."

The language of each section is general, broad, and comprehensive. The act does not discriminate between messages appertaining to matters pecuniary merely and those having reference to matters of a domestic nature, as are those now before us. On the contrary, all must be transmitted and de-

livered alike. The obligation upon the company is the same in the one class of cases as in the other; and if default occur, the remedy is the same for one person that it is for another person.

There is no discrimination with respect to the nature of the messages to be conveyed, nor is there any discrimination with respect to the nature of the damages to be recovered for the company's default. One section imposes a general duty, and the other gives a universal right of action for the breach of that duty. And of necessity the nature and amount of damages recoverable in each particular case are to be determined by the character of the message and the extent of the injury caused by the defendant's default.

It is true that the "officer or agent" of the company who willfully violates any of the provisions of section 1541 is, by section 1542, declared to be "guilty of a misdemeanor," but that does not take the place of or diminish the civil liability. Both remedies are expressly given, and neither is exclusive or in lieu of the other. The offending officer or agent is guilty of a misdemeanor, and he and the company are "also liable in damages to the aggrieved party."

The question with respect to the measure of damages in a case like this, though not of frequent occurrence heretofore, is not entirely new, nor is the view we have expressed without express authority to sustain it.

Shearman and Redfield say: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying of a child, and the like, may often be productive of an injury to the feelings which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages. Yet in such cases the damages should not be enhanced by evidence of any circumstances which could not reasonably have been anticipated as probable from the language of the written message": Shearman and Redfield on Negligence, sec. 605, p. 662.

To the same effect are the following cases: *So Rells v. Western Union Tel. Co.*, 55 Tex. 303; 40 Am. Rep. 805; *Gulf etc. Ry Co. v. Levy*, 59 Tex. 542; 46 Am. Rep. 269; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623.

In the first of these cases the telegraph company was held to be liable to So Relle for injury to his feelings, caused by its failure to promptly transmit and deliver to him a telegram announcing the death of his mother, whereby he was prevented from attending her funeral.

Levy's case is properly reported in the head-note, which is as follows:—

"The plaintiff delivered to the defendant, a railway company operating a telegraph, a message on Sunday, announcing the death of his wife and child to his father, and requesting him to come to him. The defendant negligently failed to deliver the message until the next day, too late for the funeral. Held, that the plaintiff was entitled to recover, and that exemplary damages were proper."

In the other case, Stuart sued the defendant for the non-delivery of a telegram, whereby he was prevented from seeing his brother in his last illness, and being present at his funeral. Compensation for injury to the feelings was allowed, and a judgment for two thousand five hundred dollars was sustained.

The father of the plaintiff in the Levy case just mentioned also brought suit for the negligent failure of the company to deliver to him his son's telegram. The court held that he (the father) could not recover for mental suffering, because he averred no actual damage to sustain his action; and in this decision So Relle's case was disapproved to the extent that it was supposed to authorize a recovery for injury to the feelings only: *Gulf etc. R'y Co. v. Levy*, 59 Tex. 563; 46 Am. Rep. 278.

These four are the only cases bearing upon the exact question under consideration which we have been able to find, or to which our attention has been called by counsel.

Then, upon what we regard as sound reason, public policy, and authority as well, we are constrained to differ with his honor the circuit judge, and hold that the first ground of demurrer is not well taken in any particular.

That the amount of damages allowable in such a case as this is not capable of easy and accurate mathematical computation is freely conceded; but that should not be a sufficient reason for refusing or defeating the right of action altogether; for the same objection may be urged with the same force in all cases where mental and bodily suffering are treated as proper elements of damage.

It is very appropriately said, however, in the conclusion of

the opinion in *So Relle's case*, that "great caution should be observed in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company; for it is only the latter for which a recovery may be had, and the attention of juries might well be called to that fact."

Nor do we think the suggestion that the decision we are making may encourage the bringing of other suits of a similar nature is of very great moment as a matter for the consideration of the court in its endeavor to reach a just and sound conclusion.

It is rather to be hoped that instances of such dereliction of plain, easy, and important duty have not been very numerous in the past, and that they will seldom transpire in the future.

The other ground of demurrer is, that the plaintiffs cannot maintain this action for want of privity of contract between them and the defendant. This ground is also bad.

The question is, whether a person to whom a telegraphic message is directed has a right of action against the company for its negligent delay or non-delivery of the message.

"In England, this question is undoubtedly answered in the negative. In America, on the other hand, it is invariably answered in the affirmative": Gray on Communications by Telegraph, sec. 65; Wharton on Negligence, sec. 758; 3 Sutherland on Damages, 314; Shearman and Redfield on Negligence, sec. 560; 2 Thompson on Negligence, p. 847, sec. 11.

The application of the American rule in this case is proper in the highest degree; for the messages themselves show unmistakably that they were intended for the benefit of Mrs. Wadsworth, and that she, of all persons, was the one interested in the intelligence to be conveyed.

Moreover, she is "the party aggrieved," and our statute gives the right of action to such party: Code (M. & V.), sec. 1542.

The judgment is reversed, and the case remanded at the cost of defendant.

TURNER, C. J., filed an opinion in this case, in which he stated his special grounds for concurring, and relies primarily upon sections 1321-1323 of the code (T. & S.) of Tennessee, which provide that "any officer or agent of a telegraph company who fails or refuses to carry out the preceding section is guilty of a misdemeanor"; section 1322 being that "all other messages, including those received from other telegraph companies, shall be transmitted

in the order of their delivery, correctly and without unreasonable delay, and shall be kept strictly confidential"; section 1321 follows a provision for the use of the telegraph in case of war, and for the arrest of criminals, etc.; section 1323 provides, in effect, that a failure to comply with either of the prior sections shall be a misdemeanor, and that the company shall also be liable in damages to the aggrieved party. The court, then, holds that these sections cover all messages in their terms, and render the company liable for non-compliance therewith, and also that no distinction is made defining the character of the message, concluding that "some damages may be recovered in any sort of case when the law has been violated," and adds: "The love of a sister for her brother, and her desire to be with him in his last moments, and after death care for his body and its burial, are not mere sentiments. They are the promptings and commands of nature, affection, humanity, and duty, and should not be trifled with" by a telegraph company, or its operators and agents.

LUTHER, J., dissented, saying "that an action for injury to the feelings, or fright, or grief, or other mental injury, cannot be sustained as an independent ground of action. . . . To recover for such an injury, it must be the accompaniment of actual physical injury, unless it be the exceptional action for a breach of marriage promise, or for seduction. As an accompaniment of bodily injury, or as the result of such injury, it may be the subject of consideration in the ascertainment of damages, but not otherwise"; citing at length Wood's *Mayne on Damages*, 75; *Gulf etc. R. R. Co. v. Levy*, 59 Tex. 563; 46 Am. Rep. 278; 59 Tex. 542; 46 Am. Rep. 269; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623; and the court argues, in addition, that if "the plaintiff fail to prove a physical injury, his whole case must fail, though there be ever so much mental anguish. . . . There can be no bodily suffering without pain of mind, and the law refuses to separate one from the other, and allows compensation for the whole injury"; citing *Johnson v. Wells, Fargo, & Co.*, 3 Am. Rep. 245; *Canning v. Williamstown*, 1 Cush. 451; *Lynch v. Knight*, 9 H. L. Cas. 577; *Wyman v. Leavitt*, 71 Ma. 227; 36 Am. Rep. 303; and adds that "no claim for such damages was ever before made, where the basis of the suit was a breach of contract. The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the meta-physical character of such an injury considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely upon physical and nervous conditions, the suffering of one under precisely the same circumstances would be no test of the suffering of another." The court then argues that such actions have not been limited to actions based on physical pain, but have been applied to actions of slander and libel; that the same rule applies to actions brought for the death of another, and that "the plaintiff must have a pecuniary interest in such life; . . . there can be no recovery for" injured feelings, or grief, or anguish suffered in consequence of such death; citing *Railroad v. Stevens*, 9 Heisk. 12; *Cooley on Torts*, 271, 272. Upon the code phase of the question the court says: "The code gives a right to sue for and recover damages. This right exists independently of the statute. It is a common-law right. . . . The statute does not define what damages may be recovered. We must look to the common law to determine what are legal damages"; and holds that section 1541 of the code, referred to the opinion of the majority, by providing that a violation of its terms shall be a misdemeanor, fully protects the public rights and does away with the necessity of imposing damages. The following ac-

ditional authorities are cited: 1 Sutherland on Damages, 9; *Seal v. Moreland*, 7 Humph. 574; *Turner v. Carter*, 1 Head, 520; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623; Cooley on Torts, 235. With this dissenting opinion FOLKES, J., concurred.

TELEGRAPH COMPANY IS LIABLE TO RECEIVER OF MESSAGE for neglect in transmission: *New York etc. P. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338, and note.

MEASURE OF DAMAGES FOR FAILURE OR NEGLECT OF TELEGRAPH COMPANY in transmission of message: See *Cannon v. Western Union Tel. Co.*, 100 N. C. 300; *ante*, p. 590.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

READ v. PATTERSON.

[44 NEW JERSEY EQUITY, 211.]

PARTIES. — IN A SUIT RELATING TO THE RESIDUARY ESTATE, all persons interested in the residue must be made parties.

WHERE TRUSTEES HAVE A DISCRETION TO DO OR NOT DO A PARTICULAR THING, courts of equity will not command or prohibit the exercise of the power, if the conduct of the trustees is in good faith, and not influenced by improper motives.

COURT OF EQUITY MAY MAKE AN ALLOWANCE OUT OF THE INCOME OF A TRUST ESTATE FOR THE SUPPORT OF AN INFANT CESTUI QUE TRUST, though the instrument creating the trust contains no provision for maintenance, and directs that the interest shall accumulate. In making such allowance, the court will be controlled by the amount of the infant's estate, and the expenditure required for the maintenance of the infant in his station and condition of life.

DISCRETION OF A TRUSTEE RESPECTING THE AMOUNT OF INCOME TO BE APPLIED TO THE SUPPORT OF AN INFANT WILL NOT BE CONTROLLED by a court of equity if the trustee has exercised a discretion within the limit of a sound and honest execution of the trust.

CONDUCT OF A TRUSTEE IN THE EXERCUTION OF DISCRETIONARY POWERS will be examined by a court of equity, for the purpose of determining whether he has abused his trust by acting beyond the limits of a sound and honest execution of the trust; and the court will, in a clear case, remove the trustee and assume the execution of the trust.

APPEALABLE ORDER. — Order denying defendant's application for leave to appear and answer is an appealable order.

BILL in equity by Charles and Cora, minor children of Sarah Patterson, deceased, by their guardian and next friend, against the surviving executor of Wilson Read, deceased, alleging that they are minors unable to provide for their support; that they are entitled to support out of the income of estate

in the hands of the executor, but that he refuses to concede their right, and has furnished nothing towards their maintenance except \$466, interest realized from their share of the estate. Wilson Read, the grandfather of the complainants, died testate in 1882. Among the provisions in his will were the following: "I give and bequeath to my beloved wife, Cornelia, all the interest and profits arising from the residue of all my personal or real estate, of whatsoever kind and wheresoever found, for her own personal use and benefit, or as much thereof as she may require or desire, during the term of her natural life; and in case of her death before the children of my daughter, Sarah Patterson, should be of age, then so much thereof of the interest of said estate as in the judgment of my executor may be necessary for the support and maintenance of said children of my said daughter, Sarah Patterson, during their minority. It is my will and I do order that after the decease of my beloved wife, Cornelia, that the residue of all my personal and real estate shall be equally divided between all the children of the aforesaid Thomas H. Read and the aforesaid Sarah Patterson, to share and share alike; and my executor is hereby empowered, if in his judgment it will be for the advantage of either of my grandchildren on their attaining their majority, to pay to him or her what is their fair and just proportion or share of my residuary estate." The testator survived Sarah Patterson several years. She left three children, Charles, Cora, and James, of whom the two first-named were minors when the bill was filed. Testator's widow died in 1884. His son, Thomas H. Read, was the surviving executor, and he had, as shown by his accounts, a residuary estate in his hands of \$23,747.84, after paying all debts. The executor was the only defendant in this suit. The complainants' brother, James, and the nine children of the executor were all omitted from the bill. No process was served on any one. A stipulation signed by a solicitor on behalf of the executor was filed, which waived the service of process, admitted the allegations of the bill, and stated that the parties desired to have the will construed, and the powers of defendant and the rights of the complainants determined. The case came on for hearing *ex parte*, and an interlocutory decree was entered as prayed for in the bill, directing a reference to ascertain what means of support complainants had, and what amount was necessary for such support. A hearing was had before the master, from which he found that they had no

means of support; and that five dollars per week for board and one hundred dollars per year for other expenses should be allowed to Charles, and four dollars per week for board and one hundred a year for other expenses should be allowed Cora. At this hearing the defendant appeared personally, and by the same solicitor who signed the stipulation. He also, acting by the same solicitor, filed exceptions to the master's report. The exceptions were heard before the chancellor, who pronounced an opinion, in which they were overruled. Before the order in conformity with this opinion was entered, the defendant presented a petition to the court, averring that he had no notice of the pendency of the suit until after the interlocutory decree was entered; that the stipulation was signed without the authority or knowledge of the defendant; that on complaining to the solicitor, the latter had replied that defendant would have a full opportunity to present proof, and that the whole matter, including the construction of the will, could be brought before the chancellor on exception to the master's report; and that he was subsequently surprised to learn that he could not be heard before the chancellor on the construction of the will. He prayed that the interlocutory decree and all subsequent proceedings be set aside, and that he be allowed to plead, answer, or demur to the bill. The petition was denied by the chancellor, and the master's report confirmed. The defendant appealed.

H. H. Wainwright, for the appellant.

Robert Allen, for the respondents.

DEPUE, J. From the order dismissing the petition and denying the application to open the proceedings and permit the defendant to make defense, and the order overruling the exceptions to the master's report, and the final decree, the defendant has appealed. The appeal also brings up the interlocutory decree, — the final decree involving the merits of the case as settled by the interlocutory decree: *Terhune v. Colton*, 12 N. J. Eq. 312; *Crane v. De Camp*, 22 Id. 614.

The reasons assigned for reversal are: —

1. That the other grandchildren are necessary parties. The account of the executor on file is a final settlement of the estate. The balance reported in hand is the residue, after payment of debts and expenses, to be distributed or applied according to the directions in the testator's will. In suits by

creditors or specific legatees for satisfaction of their demands, the residuary legatees need not be made parties. In such a suit, residuary legatees are interested consequentially only from the circumstance that the recovery of the debt or legacy will reduce the residue, and under such circumstances the executor is regarded as the representative of all persons interested: Story's Eq. Pl., secs. 140, 141. But that rule does not apply to this case. The testator directed the division of his estate, after the death of his wife, among his grandchildren. The event on which the distribution was to be made has occurred, and primarily the period for distribution has arrived. The testator made provision for the support and maintenance of those of his grandchildren who were children of his daughter Sarah, and conferred upon his executor power to pay to any of his grandchildren, on attaining majority, a fair and just proportion or share of the residuary estate. How far these clauses in the will control or affect the residuary disposition is one of the controversies in this case. In that controversy, the persons entitled under the residuary disposition have a direct interest. One of the questions in dispute is, whether the complainants are entitled to have support and maintenance, having regard to the entire residuary estate. On this question, the beneficiaries under the residuary clause are entitled to be heard. A decree against the executor in this suit would be no answer to a suit by the persons entitled under the residuary clause for immediate distribution. The case is therefore subject to the rule, that in a suit which relates to the residuary estate, all persons interested in the residue must be made parties: *Sheritt v. Birch*, 3 Bro. C. C. 229; *Parsons v. Neville*, 3 Bro. C. C. 365; *Brown v. Ricketts*, 3 Johns. Ch. 553; 8 Am. Dec. 587; *Devoue v. Fanning*, 4 Id. 199; *De Hart v. De Hart*, 3 N. J. Eq. 471; *Keeler v. Keeler*, 11 Id. 458. In *Dandridge v. Washington*, 2 Pet. 370, the testator, after several devises and bequests, directed that the rest and residue of his estate should be sold by his executors and invested, and the interest thereof applied to the education of his three nephews, Bartholomew Henly, Samuel Henly, and John Dandridge. He then provided that, debts and legacies being paid, and the education of his nephews being completed, the residuary estate should be divided among certain persons. On a bill filed by Dandridge for support against the executors, it was held that the residuary legatees were not necessary parties. In that case, there was no dispute involving the construction

of the will or the fund out of which support was to be furnished. The only controversy was with respect to the amount which should be applied to that purpose. In that controversy, the residuary legatees were interested only consequentially, and it was properly held that, in such a controversy, the executors were their representatives, and that the residuary legatees were not necessary parties. In its circumstances, that case differs radically from the present case. But the court also held that the complainant's suit was imperfect in the fact that the other two nephews, who were entitled to participate with the complainant in the fund applicable to their education, were not made parties to the suit. The same imperfection exists in the present suit. James Patterson, a son of Sarah, who is equally entitled with the complainants to participate in the fund set apart for the support and maintenance of her children, is not made a party, nor is there any averment of a reason which would exclude him from consideration in the disposition of the fund set apart for the common benefit of the children of Sarah. The nature of this suit requires that all who are interested in the residue should be made parties.

2. That the interlocutory decree which settled the merits of the case was made without the appellant being properly brought into court, and without opportunity being allowed him to present the merits of his defense. The petition presented to the chancellor was not an application for a rehearing. A rehearing, strictly speaking, is simply a new hearing, and a new consideration of the case by the court in which the suit was originally heard, and upon the pleadings and depositions already in the case. An order denying a rehearing in this sense would not be an appealable order. The case could be reheard upon the merits on an appeal from the original decree, and the party would not be injured or aggrieved, within the meaning of the statute, by the chancellor's refusal to rehear and reconsider it. The defendant's application was of a totally different character. He complained that the solicitor who appeared for him appeared without authority; that the stipulation filed did not present the merits of the case, and that he had not any opportunity to present his evidence. These facts are set out in the defendant's petition, which is verified by affidavits, and uncontradicted.

On the facts presented by this petition, the decree was not only made in a suit in which the defendant was not summoned,

and to which he never appeared, but also upon a record which did not present the merits of the case.

The testator designated the fund from the produce of which the support and maintenance of the children of his daughter Sarah, during minority, should be made. But he vested in his executor the exercise of judgment with respect to the amount which should be necessary therefor. He also delegated to his executor the power to pay to any grandchild, on attaining majority, a fair and just proportion or share of the residuary estate, if in the judgment of the executor it would be for the advantage of such grandchild. The powers granted are in the nature of trusts, but nevertheless they are discretionary in the sense that they are to be executed by the executor in the exercise of his judgment. Where the power given to trustees is wholly discretionary to do or not to do a particular thing, in their discretion, the court has no jurisdiction to lay a command or prohibition upon the trustees as to the exercise of that power, provided their conduct be *bona fide*, and their determination is not influenced by improper motives: 2 Lewin on Trusts, 8th ed., 612. Where the power is coupled with a trust or duty, the court will enforce a proper and timely exercise of the power; but if it be given upon a trust to be exercised in the discretion or upon the judgment of the trustee, the court will not interfere with the trustee's discretion in executing the trust, unless he has exercised his discretion *mala fide*: *French v. Davidson*, 4 Madd. 396, 402; *Pink v. De Thuissey*, 2 Id. 157, 163; *Walker v. Walker*, 5 Id. 424, 426; *Livesey v. Harding*, Tam. 460; *Douglas v. Andrews*, 3 Jur. 949; *Wain v. Earl of Egmont*, 3 Mylne & K. 445; *Costabadie v. Costabadie*, 6 Hare, 410; *Potter v. Chapman*, Amb. 98, 99; *Kekewich v. Marker*, 3 Macn. & G. 311; 2 Perry on Trusts, sec. 511.

A court of equity may make an allowance for maintenance out of the income of an estate given to a trustee for an infant, although the instrument creating the trust contains no provision for maintenance, and there is a direction that the interest shall accumulate; and in making such allowance, the court will be governed entirely by a consideration of the amount of the infant's estate and the expenditure required for the maintenance of the infant in his station and condition in life: 2 Perry on Trusts, sec. 615; 2 Lead. Cas. Eq. 711, 714, 716; notes to *Eyre v. Countess of Shrewsbury*. But another principle applies where the testator has himself provided for

the support and maintenance, and has directed that so much of the income of a fund in the trustee's hands should be applied therefor as in the judgment of the trustee might be necessary for that purpose, especially where the fund itself ultimately goes to other beneficiaries, and is subject to a power in the trustee, in his discretion, to anticipate the distribution of the fund. In such cases, the court will not take upon itself to regulate the maintenance, but will leave it to the judgment of the trustee, and will not interpose if the trustee has exercised a discretion within the limit of a sound and honest execution of the trust: 2 Lewin on Trusts, 614; *Livesey v. Harding*, Tam. 460; *Douglas v. Andrews*, 3 Jur. 949; *Costabadie v. Costabadie*, 6 Hare, 410; *Brophy v. Bellamy*, L. R. 8 Ch. App. 798; *Tempest v. Lord Camoys*, L. R. 21 Ch. Div. 571.

In *Costabadie v. Costabadie*, *supra*, the testator gave all his real and personal estate to his wife, upon trust, that she should receive the rents and profits, and pay and apply the same to her own use and to the use of the children of their marriage, agreeably and according to her own discretion, during her life. A bill was filed by an unmarried daughter, complaining that the widow, in order to save money out of the estate, had treated her children harshly, and that the complainant for that reason had been compelled to live with other members of her family, and partly to depend upon their bounty, and alleging that the sums allowed to her by her mother were not sufficient to procure for her those comforts and enjoyments to which she was accustomed during the life of the testator, and which the estate left by the testator was large enough to afford. The bill prayed an account, and that the defendant might be decreed to pay to the complainant, out of the rents, issues, and profits, such a sum as should appear to be proper in the circumstances of the case. The defendant answered, denying the harsh treatment complained of, and insisting as well on the discretion which the testator had given her as on the propriety with which it had been exercised.

Sir James Wigram, V. C., commenting on the discretionary power given, said: "The testator may limit and circumscribe the interests which he bequeaths to his children as he may think proper, and the court cannot enlarge the interest which he has given. If the gift be subject to the discretion of another person, so long as that person exercises a sound and honest discretion, I am not aware of any principle or any authority upon which the court should deprive the party of

that discretionary power. Where a proper and honest discretion is exercised, the legatee takes all that the testator gave or intended that he should have; that is, so much as, in the honest and reasonable exercise of that discretion, he is entitled to. But, consistently with the plaintiff having an interest subject to the mother's discretion, she has a right . . . to a discovery of all the acts which have been done and the reasons for doing them, which the defendant may be able to give. She has that right in order that the court may be able to see whether the discretion which has been exercised by the party intrusted with it is within the limits of a sound and honest execution of the trust. Beyond that I am not aware that, because a person who takes an interest in property, subject to the discretion of another, is dissatisfied with the exercise of that discretion, therefore the court will take it away from that party and assume itself to exercise it. If a bill be filed, the court will, of course, inquire into the acts which have been done in the administration of the trust, and may possibly (as has been done in many cases) require the trustee to exercise the discretion under the view of the court."

A court of equity will examine into the conduct of a trustee in the execution of his discretionary powers, and will assume control over the trustee's conduct, and if need be, will take upon itself the execution of the trust. But the court will exercise this prerogative with great caution, and will not displace the trustee from exercising his functions, unless, upon a consideration of the reasons and grounds upon which he has acted, it appears that he has abused his trust, and that his acts in the premises have not been within the limits of a sound and honest execution of the trust. In this case, the execution of the trust has been taken from the trustee and delegated to a master in a suit of which the trustee had no knowledge, and by a decree made *ex parte* and without an answer, which would have enabled the trustee to submit the grounds and reasons upon which he acted. In *In re Lofthouse*, L. R. 29 Ch. Div. 921, the court, having disapproved of the amount allowed by the trustees for the maintenance of an infant, under a power of this character, suspended judgment to allow the trustees to make a new offer, which the court approved in the place of the sum ordered by the vice-chancellor. In *re Gadd*, L. R. 23 Ch. Div. 134, and *Tempest v. Lord Camoys*, L. R. 21 Ch. Div. 571, are illustrations of the reluctance of the court to interfere with the discretionary powers of a trustee, although it may

disapprove of the trustee's acts. From the bill in this case it appears that there was a dispute with respect to the fund, from the income of which the complainants were entitled to support. That controversy being decided, the judgment of the executor with respect to the amount necessary for the complainants' support and maintenance remained as a substantial discretionary power to be exercised by the executor. Every allegation of fact in the bill may be true, and yet there may be no substantial grounds on which to take from the defendant the discretionary powers conferred on him by the testator.

The order denying the defendant's application for leave to appear and answer is an appealable order within principles heretofore adjudged: *Camden and Amboy R. R. Co. v. Stewart*, 21 N. J. Eq. 484; *Woodward v. Bullock*, 27 Id. 507; *Day v. Alaire*, 31 Id. 303, 315; *Beach v. Fulton Bank*, 2 Wend. 225.

Nor did the defendant lose his right to a hearing upon the merits by laches or waiver. The merits of the case were substantially disposed of by the interlocutory decree, and the defendant had no knowledge of the pendency of the suit until after that decree was made. He appeared before the master upon advice that he could then present his case, and had no knowledge that he was foreclosed until about the time of the hearing on exceptions to the master's report, and he then first learned how he had been brought before the court, and the nature, particulars, and character of the admissions that had been made in his behalf, and he thereupon promptly made this application.

There should be a reversal, and the record be remitted, to the end that the bill may be amended in the matter of parties, and that the defendant be allowed to plead, answer, or demur thereto.

PRECATORY TRUSTS: See note to *Harrison v. Harrison's Adm'r*, 44 Am. Dec. 372-379.

CONTROLLING DISCRETION OF TRUSTEE. — Formerly courts of equity supervised and controlled the exercise of discretionary powers by trustees: *Perry on Trusts*, sec. 510. At the present time, this authority is universally denied: *Id.* 511. But the discretion of trustees may, without impropriety, be likened to that of judges. It is not an arbitrary discretion. It does not include the unrestrained power to do what the trustee pleases. To extend it that far is to make it a means of destroying the trust which it was intended to aid and maintain. The trustee, instead of doing merely what, in his present circumstances, he chooses to do, in deference to his interests or inclinations, is to do that which his honest, disinterested judgment approves, or

ought to approve. He must not act under the impulses of fraud, collusion, or self-interest. "A person having a power must execute it *bona fide* for the end designed, otherwise the appointment, although unimpeachable at law, will be held corrupt and void in equity"; or, as was said by Lord Westbury in *Duke of Portland v. Topham*, 11 H. L. Cas. 54, "the donee under the power must, at the time of the exercise of the power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power": See note to *Alegn v. Belcher*, 1 Lead. Cas. Eq., 4th Am. ed., 578-605.

"Whenever the law can control the exercise of a discretionary power, it will do so; as where a trustee has power to expend the principal of an estate for the benefit of a poor woman, 'if urgent necessity should require,' it was held that the court could compel the execution of the power. So also courts can interfere and prevent, by injunction or decree, an abusive, fraudulent, collusive, illusive, or other improper exercise of a discretionary power. To determine what is an abuse of a discretionary power, or what is a fraudulent or improper execution of it, is frequently a matter of great difficulty. In the nature of things, only very general rules can be laid down upon a subject where so much must depend upon the facts of each individual case. Some general propositions have, however, been stated. It has been said: 1. That where a power of electing has been given trustees, as to the rights of third persons, they are bound to exercise such power most beneficially for the *cestui que trust*; 2. Reference must be always had in the execution of a power, to the end or purpose intended by the creator of the power, and this end or purpose must be gathered from a construction of the written instrument; and a power must always be executed *bona fide*, to the end and for the purpose designed; 3. A power cannot be executed in favor of the donee of the power, or of his family, unless the instrument specially authorize him to do so; 4. The donee of the power cannot execute it for any pecuniary gain, directly or indirectly, to himself; nor 5. Can he exercise it for any purpose personal to himself": Perry on Trusts, sec. 511 a.

BLAKE v. FLATLEY.

[44 NEW JERSEY EQUITY, 228.]

SPECIFIC PERFORMANCE WILL NOT BE DECREED WHERE THE VALUE OF THE REAL PROPERTY of which a conveyance is sought is so small as to amount to little more than the usual costs of an undefended suit in chancery, unless there are some special circumstances showing that the property has a special value to the complainant.

BILL for specific performance of a contract to convey to complainant certain lands. The wife of defendant refused to join in any conveyance; and the court found that her refusal was not attributable to any fraud of her husband. Decree against the husband alone, with costs, but without indemnity.

D. J. Pancoast, for the appellants.

Alfred Flanders, for the respondent.

SCUDDER, J. A bill was filed for the specific performance of a contract in writing, signed by the defendant John Blake, to convey a lot of land for the sum of fifty-five dollars, to be paid in cash when the purchaser received his deed. Five dollars were paid on signing the contract. The land is described in the receipt given and memorandum of sale as a lot of land near lands of Michael Haggerty. It appears in the evidence that, before the writing was signed by Blake, the lot was examined and designated by the parties, and there is no dispute or difficulty as to the exact location of the land intended to be conveyed, for a more particular description is given in the bill of complaint, and admitted in the answer to be correct. The defendant Blake further offers in his answer to make the conveyance required, as he has always been willing to do; but his wife refuses to execute the deed. Both say that she had no knowledge of, and never gave her consent to, the contract for a conveyance. The decree directs a deed to be made by Blake to the complainant, not by his wife, and does not require any indemnity against her subsequent acts, as no sufficient evidence of fraud or collusion was shown. It gives the costs of suit to the complainant against Blake, and dismisses the bill as to the wife, but without costs to her or the complainant.

It appears from this statement of the case that the real grievance of which the defendants, who have taken this appeal, may justly complain is the imposition of a large bill of costs upon each of them. It might be said that the court can properly relieve the defendants by reversing the decree for costs, and putting them on the complainant, who gets by the decree only what he might have had without controversy,—the title of the husband to the lot of land. This, however, would not reach the question which has been mainly considered by us in this case, but was overlooked in the court below, though pleaded in the separate answers, and the same benefit claimed as if each had demurred to the complainant's bill. This question is, whether it is correct practice for a court of equity to compel a specific performance of a contract for the conveyance of land where the purchase price is so small as to be but little more than the usual costs of an undefended suit in the court of chancery,—less, in fact, than the complainant's

taxed costs in this case, and no special equity is shown in the bill. The lot described is a small, unimproved piece of land, without any peculiar value to the complainant for business purposes, or by any connection with his other property, or for any use to which he may wish to apply it. A case may be conceived where a small lot of land, of little value to others, might be so located as to be an important possession to a purchaser. In such case, his claim for a conveyance would be based on his equity to have it, because no other adequate relief could be given to him. This is the original foundation of the jurisdiction of courts of equity to compel a specific performance of contracts for the conveyance of land. A wider rule has been adopted in many cases; and it is said that where a contract respecting real estate is, in its nature and circumstances, unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it as it is for a court of law to give damages for the breach of it: *Hall v. Warren*, 9 Ves. 605; *Greenaway v. Adame*, 12 Id. 395; *King v. Hamilton*, 4 Pet. 311; 1 Story's Eq., secs. 750, 751.

But it is also held that courts of equity will not interfere to decree a specific performance except in cases where it would be strictly equitable to make such a decree. Whether, therefore, the contract shall be enforced specifically must rest in the sound and reasonable discretion of the court, depending on the equity of the particular case, and the nature of the objections to it. It must determine what are the objectionable circumstances which will control its jurisdiction in such cases, within the established rules of equity, though none of these rules are of absolute obligation and authority in all cases: *Gariss v. Gariss*, 16 N. J. Eq. 79; *Pinner v. Sharp*, 23 Id. 274; *Locander v. Lounsbery*, 24 Id. 417; *Plummer v. Keppler*, 26 Id. 481; *Brown v. Brown*, 33 Id. 650; 1 Story's Eq., sec. 742.

It is a serious objection to the exercise of the extraordinary jurisdiction of the court in this case that there is not an allegation in the bill of complaint, nor a single fact in the evidence, to show that the complainant would be in a worse position if he should bring his action at law to recover damages for a breach of this agreement, nor a reason given for burdening the defendants with large bills of costs in such a small matter. An action for damages, where the amount that can be reasonably claimed is so little, must, by statute, be brought in an inferior court of law, where the costs are much less than in the higher courts of law or equity.

To permit the complainant to evade this statutory limitation of costs by bringing his action in a higher court, and claiming a remedy there which does not appear to be in any way more beneficial to him, would be contrary to the policy of the law, and unjust in its result. If this decree is affirmed, the defendant will lose the whole purchase price of his land in costs, and the complainant be in no better position than if he had pursued his less expensive remedy at law. The case is without precedent in the small value of the land in controversy, and the absence of any special cause for its prosecution in a court of equity. These objections conjoined are sufficient to influence this court to deny the relief which the complainant has sought in his bill for specific performance.

The decree will be reversed, the bill dismissed, and costs allowed to the defendants.

SPECIFIC PERFORMANCE will not be decreed in favor of one who obtained his contract by misrepresentation or fraud, though such fraud, while it prejudiced a third party, did not injuriously affect the other contracting party: *Kelly v. Central Pacific R. R. Co.*, 74 Cal. 557; 5 Am. St. Rep. 470; nor where there is not mutuality both in obligation and in remedy: *Iron Age P. Co. v. Western Union Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 758; nor where the contract is illegal, hard, or unconscionable: *Swint v. Carr*, 76 Ga. 322; 2 Am. St. Rep. 44. For a statement of the principles controlling courts of equity in deciding whether to grant or withhold the relief of specific performance, see note to *Anderson v. Green*, 23 Am. Dec. 423-431.

CAMPBELL v. RODDY.

[44 NEW JERSEY EQUITY, 244.]

MORTGAGE, WHAT IS.—A conveyance, assignment, or other instrument transferring an estate is considered in equity a mortgage, if originally intended as security for the payment of money, whether such intention appears from the same instrument or any other.

FIXTURES.—Structure erected on the land of another becomes his property, although built with a view of enforcing an adverse right in the land.

FIXTURES.—**AGREEMENT BETWEEN A LAND-OWNER AND ONE AFFIXING CHATTEL TO THE LAND**, that such chattels shall retain their character of personality, is efficacious between the parties thereto. In some of the states such agreement is equally effective against prior mortgagees and against subsequent purchasers or encumbrancers having notice thereof.

MORTGAGEE'S RIGHT TO FIXTURES SUBSEQUENTLY ANNEKED.—If, after the execution of a mortgage, chattels which belong to a third person, or upon which he has a chattel mortgage, are affixed to the land, his interest or lien does not therefrom become subject to the prior mortgage. The chattels may be detached notwithstanding the objection of the prior

mortgagor, unless such detachment will so injure the freehold as to make it substantially less valuable than it would have been had the chattels never been attached thereto.

J. D. Bedle, for the appellants.

A. V. Schenck, for the respondents.

REED, J. The question presented by this appeal arises out of the circumstance that a mortgagor of real property, after making the mortgage, had annexed to the real estate certain chattels in which a third person claimed to have an interest. On a bill filed to foreclose the mortgage, a contest arose as to the right of the mortgagee to have all the property applied primarily to the payment of his mortgage, regardless of the interest which any other person may have had in the annexed property before its annexation.

The facts as they appear more in detail are the following: Riley A. Brick and wife gave a mortgage to Roddy and Meinzers, trustees, on a certain lot of land, with the buildings and improvements thereon erected. The buildings were designed for use as an iron foundry. The mortgage was dated May 17, 1880, and was made to secure the payment of notes to the amount of ten thousand dollars, made by Brick to these trustees. On May 29th, twelve days after this mortgage was executed by Brick and wife, Brick purchased of one Robert Campbell a large lot of machinery and other personal property for the sum of thirty thousand dollars. Ten thousand dollars of the consideration was paid in cash. Four promissory notes were given by Brick to Campbell, each dated May 1, 1880, each for the payment of five thousand dollars, and each containing the following words: "It is further agreed that the title to the property for which this note is given shall remain in said Robert Campbell until this note is fully paid."

As security for a portion of these four notes, Brick gave to Campbell, on the day of the sale, May 29th, a mortgage for ten thousand dollars on the same real estate already mortgaged to the trustees. The sale of the chattels was evidenced by a writing given by Campbell, the vendor, to Brick, the vendee, also dated May 29, 1880. It is a bill of sale with the following proviso: "Provided, however, that this sale is made upon the express condition and agreement that in case of default of payment of either of the said notes, then this conveyance to be void and of no effect, and the possession of the goods shall revert to the party of the first part."

Then follows a power conferred upon the vendor, in such case, to take possession and sell, and pay himself out of the proceeds, rendering the surplus, if any, to the vendee. A part of the chattels so sold by Campbell to Brick was, with Campbell's knowledge, placed in the buildings on the premises already mortgaged to the trustees. They were so annexed to the mortgaged real estate that, as between the mortgagor, Brick, and the trustees, the mortgagees, they became a part of the mortgaged premises: *Butler v. Page*, 7 Met. 40; 39 Am. Dec. 757; *Clary v. Owen*, 15 Gray, 522; *Murdock v. Gifford*, 18 N. Y. 28; *Walmsley v. Moor*, 7 Com. B., N. S., 115.

There was, indeed, no denial, on the argument of the appeal, that, as between the mortgagor and mortgagee, the steam-boiler, engine-jacks, and those chattels which the trustees claim in their bill of foreclosure as part of the real estate, were so attached as to become incorporated into the realty.

But, as already remarked, the contest is not between the mortgagees of the realty and a mortgagor claiming that he had an interest in property which he had annexed, and claiming that that interest was unaffected by the pre-existing mortgage. A third person, namely, the vendor of the chattels, claims that he had an interest in them which was not lost or impaired by reason of their annexation of the mortgaged real estate by the act of the vendee of the chattels, who was, at the same time, the mortgagor of the real estate. It is admitted that Campbell had an interest in the chattels previous to their annexation. What the character of that interest was may afford some ground for discussion. If the agreement which is found in the body of the several notes is to be resorted to for the purpose of establishing the extent of his rights, it appears that the title to all these chattels remained in him until divested by payment of the notes: *Cole v. Berry*, 42 N. J. L. 308; 36 Am. Rep. 511.

If, however, the bill of sale, signed by both the vendor and vendee, is the source from which he derives his interest, it is difficult to see how the vendor had anything, apart from the naked power to take possession and sell, upon the happening of a certain event. The bill of sale did not provide that the title should remain in the vendor. By its terms, the title passed to the vendee absolutely, with the proviso that the possession should revert to the vendor upon default in payment of the notes. A chattel mortgage at law arises only when the title rests with the mortgagee, with a defeasance upon per-

formance of a condition. By the terms of this bill of sale, the title resided in the vendee, and the vendor only retained a right to take possession and sell in the future, which power was one not coupled with a present interest: *Parshall v. Eggart*, 52 Barb. 367; *Holmes v. Hall*, 8 Mich. 66; 77 Am. Dec. 444; *Bonsey v. Amee*, 8 Pick. 236; *Hunt v. Rousmanier*, 8 Wheat. 174.

But in reaching the intention of the parties in respect to the character of the sale, we must read the papers together, and if, from the language used in the notes, read in connection with the proviso in the bill of sale, it appears that it was understood that the title should remain in the vendor but for a special purpose only, namely, to secure the notes, then the transaction should, in equity, be regarded as a chattel mortgage. It may be laid down as a general rule, says Judge Story, subject to few exceptions, that whenever a conveyance, assignment, or other instrument transferring an estate is originally intended between the parties as a security for money or for other encumbrance, whether this intention appear from the same instrument or from any other, it is always considered in equity as a mortgage, and consequently is redeemable upon the performance of the conditions and stipulations thereof: 3 Story's Eq. Jur., sec. 1018.

Coupling the clauses which I have mentioned, contained in the contemporaneously executed papers, I think that there is exhibited an intention to leave the title in Campbell as a security only, with a power of sale upon the part of the vendor, and the power to redeem by payment on the part of the vendee. This would fix upon the transaction the character of the chattel mortgage.

The chattel mortgage was not refilled, in conformity with the statute, so as to preserve its validity against creditors and purchasers. The mortgage, however, was good as between the parties thereto at the time of the annexation of the chattels, and the mortgagees of the real estate stand neither in the light of creditors nor of subsequent purchasers.

The facts, then, present the bare question: What is the position of a mortgagee of real estate into which mortgaged chattels have become incorporated by the act of the mortgagor, subsequent to the execution of the real estate mortgage?

The elementary rule of the common law was, *Quicquid plantatur solo solo cedit*. It may be stated, as a rule of great antiquity, that whatever is affixed to the soil becomes, in contemplation of law, a part of it, and is consequently sub-

jected to the same rights of property as the soil itself: Broom's Maxims, 268. But many exceptions have become engrafted upon this rule.

"The law of fixtures," says Kent, "is in derogation of the original rule of common law which subjected everything affixed to the freehold to the law governing the freehold, and it has grown into a system of judicial legislation, so as almost to render the right of removal of fixtures a general rule instead of being an exception": 2 Kent's Com. 343.

The question whether property is or is not a fixture arises most frequently between the tenant of a particular estate and those in reversion or remainder. As between these parties, it is held, by a well-settled line of cases, that the intention of the tenant making the annexation is one of the three tests to be resorted to in ascertaining the nature of the property. It is equally well settled that in instances aside from those, the mental attitude of the person making the annexation cannot modify the legal effect resulting from an incorporation into the realty of that which was personal property. Thus a structure erected on the land of another will become the property of the owner of the land, although built with a view of enforcing an adverse right in the land: *Sudbury v. Jones*, 8 Cush. 184; *Lee v. Risdon*, 7 Taunt. 188; *Wilde v. Waters*, 16 Com. B. 637; *Overton v. Williston*, 31 Pa. St. 155.

An intent existing alone in the mind of him who makes the annexation, however, differs from another feature, which is recognized in the cases as preserving the personal character of the property annexed. That feature consists in the existence of a mutual agreement, express or implied, between the owner of the real estate and the chattels, in respect to the manner in which chattels shall be regarded after their annexation. Such an agreement seems to be entirely efficacious in preserving the personal character of the annexed chattels as between the parties thereto: *Pope v. Skinkle*, 45 N. J. Eq. 39; *Harlan v. Harlan*, 20 Pa. St. 303; *Ewell on Fixtures*, 66.

This rule, which seems simple enough when applied to a cause arising between the respective real and chattel owners, becomes more difficult of application when the rights of persons other than these owners are involved. The additional question then arises, how far such an agreement between these parties can affect purchasers, mortgagees, or judgment creditors of the owner of the real estate on the one hand, or of the chattels on the other hand. The courts of New York have

accorded to an agreement between the owner of land and one owning or having an interest in annexed chattels very great efficacy. Those courts hold that such an agreement is valid, not only against a prior mortgagee of the land, but also against a subsequent mortgagee or purchaser without notice. In the case of *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537, it was held that neither a precedent nor a subsequent mortgagee of real estate can claim property which has been annexed to the mortgaged premises under an agreement between the owner of the fee and the owner of the chattels, to the effect that the latter shall remain personalty. In *Ford v. Cobb*, 20 N. Y. 344, it was held that a duly filed chattel mortgage upon iron salt-kettles and an iron arch-piece preserved their character as chattels even against the subsequent purchaser of the land, to which land the owner had annexed the chattels. So the rule in New York seems settled that such an agreement will affect not only the parties to it, but all prior and subsequent interests in the realty.

The supreme court of Massachusetts has taken a different view of the force of such an agreement. In *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310, a chattel mortgage was given on machinery which the mortgagee knew was to be annexed to real property, and after it had been annexed, a mortgage was given on the realty, and it was held that the real estate mortgagee could hold the machines as a part thereof. In the case of *Hunt v. Bay State Iron Co.*, 97 Mass. 279, a question arose in respect to the effect of such an agreement between the owner of iron rails and a railroad company which purchased them. The query was, whether the agreement would preserve the character of the rails as chattels, after they had been affixed to the road-bed, as against a previous mortgagee of the road, or a subsequent purchaser without notice. It was held that the agreement to which they were not parties could affect neither purchasers nor prior mortgagees, and as to them, the rails became real estate. So in the supreme court of Iowa, in *Stillman v. Flenniken*, 58 Iowa, 450, 43 Am. Rep. 120, it was held that such an agreement would not affect the rights of a purchaser of real estate at a judicial sale. It may be remarked that the New York cases seem to be in confusion as to whether the existence of a chattel mortgage upon the personalty at the time of the annexation by the mortgagor amounts to an agreement that the chattel shall remain such.

The case of *Voorhees v. McGinnis*, 48 N. Y. 278, holding that

it did not amount to an agreement, is apparently recognized in *Tift v. Horton*, *supra*, and left in doubt in the last case of *Sisson v. Hibbard*, 75 Id. 542. I do not regard this question as material in the present cause, from the standpoint whence I view it, nor do I think it essential to follow the doctrine of those cases which give to the agreement the greatest force in preserving the chattel character of the property, or of those cases which concede to the act of annexation the greatest force in transforming the chattels into realty. Whether the chattel mortgage in the present cause was registered or unregistered, it, as between the parties thereto, created a lien in favor of the mortgagee upon the engines and machinery mortgaged. The interest of the mortgagee of the chattels, as well as that of the prior mortgagee of the real estate, under the doctrine respecting mortgages, both real and personal, which obtains in this state, were mere securities: *Woodside v. Adams*, 40 N. J. L. 417.

The inquiry naturally arises, how far this lien of the chattel mortgage can be preserved after the annexation.

It will be observed that the question now presented differs radically from that which would have arisen had the real estate mortgage been executed subsequent to the annexation of the chattels. As between a lienor who consents to have the subject-matter of his lien transmuted into a shape by which subsequent purchasers and mortgagees are liable to be subjected to deceptive dealings, there seems to be no equitable ground upon which the lien should be recognized against an innocent subsequent mortgagee or purchaser for value. The entire spirit of our registry acts is opposed to the notion that, in such a juncture of affairs, the real estate purchaser would not be regarded as a *bona fide* purchaser against whom the chattel mortgage would be void. But, as already observed, the real estate mortgagees in the present case held their lien before the attachment to the realty of the mortgaged chattels. It is true that by force of the annexation they would become subjected to the lien of the real estate mortgage absolutely, unless the lien of the chattel mortgage intervenes. Any property belonging to the mortgagor which he chooses to annex to the mortgaged premises becomes realty. But it is difficult to perceive any equitable ground upon which the property of another which the mortgagor annexes to the mortgaged premises should inure to the benefit of a prior mortgagee of the realty. The real estate mortgagee had no assurance at the

time he took his mortgage that there would be any accession to the mortgaged property. He may have believed that there would be such an accession, but he obtained no right, by the terms of his mortgage, to a lien upon anything but the property as it was conditioned at the time of its execution. He could not compel the mortgagor to add anything to it. So long, therefore, as he is secured the full amount of the indemnity which he took, he has no ground for complaint. There is therefore no inequity towards the prior real estate mortgagee, and there is equity toward the mortgagee of the chattels, in protecting the lien of the latter to its full extent, so far as it will not diminish the original security of the former. As already remarked, the real estate mortgagee is entitled to any annexation made by his mortgagor of his own property, but is not entitled to the property of others. The property of the mortgagor in these chattels, when he made the annexation, was an equity of redemption. So far as this interest had a value, it became subjected to the lien of the prior real estate mortgagee, but the value of his interest was the value of the property subjected to the lien.

The supreme court of the United States has enunciated a rule which I regard as analogous to the one now propounded. It is in respect to the acquisition of property by a railroad company which has already given a mortgage upon its road and franchises and upon future-acquired property. The doctrine announced is, that the mortgage attaches itself to the property in the condition in which it comes to the mortgagor's hands. In the language of Justice Bradley, in the case of *United States v. New Orleans R. R. Co.*, 12 Wall. 362, it only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase-money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment or recognizance, can displace such mortgage for purchase-money. This rule was followed in *Foedick v. Schall*, 99 U. S. 235. It is true that in the opinions in these cases there is a statement that the rule would be different if the articles upon which the lien existed became incorporated into the road itself. Instances may be imagined where the exception so indicated would be proper. Where the articles are of such a character that their detachment would involve the dismantling of an important feature of the realty, their an-

nexation might well be regarded as an abandonment of the lien by him who impliedly assented to the annexation. Shingles, lumber, brick, to be used in a building, railroad iron or ties to be used in constructing a railroad, are apparent samples of such a class of chattels. I am not prepared to say, however, that even in such instances there may not be an equitable method of awarding to a prior mortgagee of the realty all his rights, while preserving, in some degree, the interest of the lienor of the chattels. For, in my view, the equitable way of dealing with the property is to preserve the right of the prior real estate mortgagee to the same degree of security which he would have enjoyed had the property remained as when mortgaged. The preservation of that right in its full measure would, in some instances, be entirely inconsistent with the recognition of any remaining adverse right in an indistinguishable portion of the realty. The question involves merely the practical application of equitable principles to the diverse interests. I regard the case above cited as relevant, because I see no greater legal difficulty in preserving the lien upon property which would otherwise become subjected absolutely to the lien of a prior real estate mortgage by way of accretion or estoppel than if it became subject to such mortgage by an express agreement that the mortgage should cover after-acquired property.

In the practical application of the equitable rule that the lien on the chattels must give way to the previous lien upon the real property in the degree already indicated, there is no difficulty where the annexed chattels, as in the present case, are a distinguishable and separable part of the realty. If the detachment of the articles so annexed will occasion no damage to the realty, then the lien upon them can be enforced in the same degree as if they had remained chattels. If the detachment would occasion some diminution in the value of the freehold, as it would have stood had the attachment not been made, then the depreciation must first be made whole to the real estate mortgagee before the right of the chattel mortgagee can be recognized. So far as appears in the present case, there can be no appreciable injury to the realty occasioned by the removal of the engines and chattels.

It is perceived that the view above indicated does not rest upon an agreement which preserves the chattel nature of the engines. It rests upon an equitable preservation of the lien upon chattels after they are transmuted into realty. The

limitation upon the otherwise legal effect of the annexation is merely to this extent. The mortgagor's interest in the chattels is not relieved from the legal result arising from the annexation. If an engine worth ten thousand dollars is attached by the mortgagor of land so as to become a part of the land, I see no reason why it should retain its character as personalty because there happens to be a previous chattel mortgage upon it for five hundred dollars. The equity of redemption is covered by the prior real estate mortgage.

This view may lead to an inquiry, when the occasion arises, whether such annexation will cause a modification of the legal remedy of the chattel mortgagee. It may also, where, as in this case, only a part of the chattels covered by one chattel mortgage are annexed, call for a marshaling of securities for the purpose of ascertaining whether the portion annexed is still liable for any or what portion of the sum still due upon the chattel mortgage. When, however, as seems to be probable in this case, the totality of the mortgaged chattels will be needed to answer the claims secured, the application of the rule is simple.

The conclusion is, that the decree below should be reversed, and the cause remitted to the court of chancery. If it there appears that the equity of redemption in the chattels is valueless, that court can exclude them from the sale under the foreclosure decree. If it appears that there is some valuable interest in the equity of redemption, the court can then either confine the sale to that interest so far as the sale concerns these chattels, or can order them to be sold absolutely, and leave the rights which the parties have in them to be adjusted in making a disposition of the money arising from the sale.

FIXTURES. — Owner of land may reimpres the character of personalty on chattels which have become fixtures according to the ordinary rules of law, if they have not become so incorporated into the realty as to lose their identity: *Tyson v. Post*, 106 N. Y. 217; 2 Am. St. Rep. 409. Chattels annexed to realty, which are subject to a chattel mortgage, remain subject to such mortgage as against every person having notice thereof: *Sowden v. Craig*, 28 Iowa, 156; 96 Am. Dec. 125; *Tift v. Horton*, 53 N. Y. 377; 13 Am. Rep. 537. But persons acquiring an interest in or lien upon real estate, whose equities are those of a *bona fide* purchaser for value, cannot be affected by agreements that fixtures annexed to the land shall be regarded, notwithstanding such annexation, as personalty: *Stillman v. Flemming*, 58 Iowa, 450; 43 Am. Rep. 120.

DENNIS v. JONES.

[44 NEW JERSEY EQUITY, 512.]

RESCISSION OF A CONTRACT ON THE GROUND OF FRAUD MUST BE PROMPTLY MADE, or the right to make it is waived. A defrauded party has but one election to rescind, and must exercise that election with reasonable promptitude after discovering the fraud. When he once elects, he must abide by his decision.

ELECTION NOT TO RESCIND A CONTRACT ON THE GROUND OF FRAUD MAY BE INFERRED from payments of purchase-money after notice of the fraud, or from continuing to deal with the property as if no fraud existed.

BILL to foreclose a mortgage on a skating-rink which the complainants had sold to the defendants. Cross-bill was filed seeking a rescission of the contract of sale, and relief from the mortgage on the ground of fraud in effecting the sale. Decree foreclosing the mortgage, and dismissing the cross-bill.

Elwood S. Leary and Ludlow McCarter, for the appellants.

Craig A. Marsh, for the respondent.

THE CHANCELLOR. On the 14th of February, 1885, the respondent agreed to sell to the appellants his skating-rink, at Plainfield, in this state, for the sum of ten thousand dollars, five thousand dollars of which was to be paid in cash, and the other five thousand dollars was to be secured by a chattel mortgage upon the rink, and paid in monthly payments of not less than three hundred dollars each, on or before April 1, 1886.

When the agreement was completed, the appellants were put in possession of the purchased property, and a week later paid five thousand dollars, received a bill of sale of the rink, and gave their chattel mortgage to secure the five thousand dollars remaining unpaid.

To a bill to foreclose that mortgage, filed in September, 1885, the appellants set up by answer and cross-bill that they were defrauded by the respondent at the sale of the rink by his misrepresentation of the profits that he had received from it, and the character of its patrons. They allege that he declared that his net profits from his operation of the rink had been one thousand dollars per month, and that the rink was patronized by numbers of the most respectable people in Plainfield.

They admit that within a week from the time they took possession of the rink, they discovered that the conduct of

some of the respondent's employees with disreputable characters, who were allowed to frequent the place, had driven away many of the better class of patrons; and it abundantly appears by the proofs that they also speedily found out that the net profits to be derived from the rink were inconsiderable in comparison with a net profit of one thousand dollars per month. So great, indeed, is the disparity between the appellants' receipts and the profits which they allege the respondent claimed to have received, that it was plainly impossible for his representations to have been true. Notwithstanding these discoveries had been made on April 2, 1885, the appellants paid the respondent three hundred dollars on account of his mortgage, and on the 13th of June the further sum of six hundred dollars, and thereafter repeatedly promised to pay him the full amount secured by the mortgage, and until foreclosure of the mortgage was commenced, failed even to intimate to him that they had been defrauded. During the time that elapsed between the discoveries of the fraud and the foreclosure they dealt with the property as their own, made changes in it and in the method of conducting its business, advertised it for sale, and negotiated with third persons for the disposition of it.

While they thus dealt with it, and prior to the foreclosure, it became plainly apparent that the popular *furor* for roller-skating was waning, and that the business they had entered upon must soon collapse.

Under this condition of affairs, they now seek to rescind their contract because of the fraud they allege to have been practiced upon them.

The master rested his decision of the case upon the failure of the appellants to establish the alleged fraud, reaching his conclusion after a careful examination of several hundred pages of conflicting testimony.

It is unnecessary for us to determine whether the proofs establish the fraud; for it is apparent that if there was in fact the fraud complained of, it in substance became manifest to the appellants months before the foreclosure suit was commenced. When it was discovered, it was the appellants' duty, with all reasonable diligence, to disaffirm the contract. They could not derive all possible benefit from the transaction, and then be relieved from their obligation by a rescission, or refusal to perform, on their part. It would be most inequitable to permit them to hold the rink and its business in apparent

acquiescence in the fraud until the collapse of the business was assured, and then rescind their contract.

It is the rule that the defrauded party to a contract has but one election to rescind, that he must exercise that election with reasonable promptitude after discovery of the fraud, and that when he once elects, he must abide by his decision: Bigelow on Fraud, 436. Delay in rescission of the contract is evidence of a waiver of the fraud, and an election to treat the contract as valid: *Williamson v. N. J. Southern R. R. Co.*, 29 N. J. Eq. 311, 319; *Brown v. Mutual Benefit Life Ins. Co.*, 32 Id. 809; *Oakey v. Cook*, 41 Id. 350; Bigelow on Fraud, 438; 2 Pomeroy's Eq. Jur., sec. 817; *Baird v. New York*, 96 N. Y. 567; *Farlow v. Ellis*, 15 Gray, 229. So payments of purchase-money after knowledge of the fraud are evidence to the same effect: *Kunckolls v. Lea*, 10 Humph. 577. And so, also, is the continued dealing with the property purchased, and in reference to the fraudulent transaction, as if the contract were subsisting and binding: *Bassett v. Brown*, 105 Mass. 551; 1 Story's Eq. Jur., 13th ed., 227; 2 Kent's Com., 11th ed., 637; *Vigers v. Pike*, 8 Clark & F. 562; *Schiffer v. Dietz*, 83 N. Y. 300.

I think that, in the case now considered, it is plain that after the appellants had knowledge of all the substantial features of the alleged fraud, and were fully aware of the deceit which had been practiced upon them, they so acted as to afford plenary evidence of an election to abide by their contract. Their election thus made was irrevocable.

The decree should be affirmed.

THE RIGHTS AND DUTIES OF ONE WHO SEEKS TO RESCIND A CONTRACT are considered in the note to *Johnson v. Evans*, 50 Am. Dec. 672-681. Party wishing to rescind must act within a reasonable time: *Wilbur v. Flood*, 16 Mich. 40; 93 Am. Dec. 203; *Hoadley v. House*, 32 Vt. 179; 76 Am. Dec. 167; and must restore whatever he has received under the contract: *Woodbury v. Woodbury*, 47 N. H. 11; 90 Am. Dec. 555.

MELICK v. PIDCOCK.

[44 NEW JERSEY EQUITY, 525.]

TO THE CREATION OF AN ESTATE OF INHERITANCE, THE WORD "HEIRS" IS NECESSARY, if it is to be created by a feoffment or grant; but in a will, such estate may pass without the use of the word "heirs."

ALL DEEDS SHOULD BE CONSTRUED FAVORABLY, and as near the intention of the parties as possible, consistent with the rules of law.

TO CREATE A FEE, IT IS NOT ESSENTIAL THAT THE WORD "HEIRS" BE LOCATED IN ANY PARTICULAR PART OF THE GRANT.

TRUSTEE WILL TAKE LEGAL ESTATE IN FEE, THOUGH LIMITED TO HIM WITHOUT THE WORD "HEIRS," if the trust which he is to execute be to the *cestui que trust* and his heirs. The words of limitation must here be treated as applying to the legal as well as to the equitable estate, for to otherwise construe them would deprive the trustee of power to execute his trust.

A LEGAL ESTATE IS CONVERTED INTO AN EQUITABLE ONE by the statutes of New Jersey in favor of the *cestui que trust* whenever an estate is granted to one person for the use of another.

James J. Bergen, for the appellants.

J. G. Shipman and A. C. Hulshizer, for the respondent.

DEPUE, J. Tunis D. Melick, on the 20th of April, 1878, made a mortgage to his father, Peter W. Melick, upon certain lands in the county of Hunterdon, which he had acquired under the will of his grandfather. The mortgage was assigned by Peter W. Melick to Fisher Pidcock, the complainant, on the 24th of July, 1884.

Subsequent to the making of the mortgage, and prior to the assignment to Pidcock, to wit, on the 15th of May, 1878, Tunis conveyed the mortgaged premises to Sarah Ann Studdiford in trust. The deed of conveyance was an indenture of bargain and sale between Tunis D. Melick of the first part, and Sarah Ann Studdiford of the second part, whereby the party of the first part, for the consideration of one dollar, did grant, bargain, sell, alien, release, convey, and confirm all that certain interest or remainder devised to him by his grandfather in the premises unto the party of the second part, in trust, nevertheless, for the two children of Tunis D. Melick, Clarence and Caroline, for their use and benefit, and their heirs, as tenants in common, in equal shares and proportions; it being intended by this indenture to convey the same, subject only to such charges and encumbrances as by said last will and testament are set out, it being the object of the said party of the first part to convey all his right, title, and interest therein, with the appurtenances, to have and to hold the aforesaid premises, with the appurtenances, unto the party of the second part, in trust, as aforesaid, for the said Clarence and Caroline Melick, their heirs and assigns forever.

In this condition of the title, Pidcock, on the 19th of August, 1884, filed a bill to foreclose his mortgage, and for the sale of the mortgaged premises. To this bill, Clarence and Caroline Melick, the *cestuis que trust*, were made parties, and filed answers. Sarah A. Studdiford died before the bill was filed.

Tunis D. Melick was not made a party, he having conveyed by the trust deed his interest in the mortgaged premises. A final decree for the sale of the mortgaged premises was made October 2, 1885. On this decree execution issued to the sheriff of Hunterdon, who made sale of the premises on the 25th of January, 1886. At this sale the complainant became the purchaser. The sale was confirmed by the court, and a deed in pursuance thereof made and delivered to the complainant.

Tunis D. Melick was in possession of the mortgaged premises at the time of the foreclosure sale, and the complainant applied to the court for a writ of assistance against Tunis D. Melick to have possession of the premises delivered to him. A writ of assistance was refused, on the ground that there being no word of inheritance in the grant to Mrs. Studdiford, upon her death the interest of the grantor devolved upon him again, and the rights of the *cestuis que trust* terminated: *Pidcock v. Melick*, N. J. Chan., Feb. 11, 1887.

The complainant thereupon filed this bill, which is a bill of strict foreclosure, as distinguished from the usual bill for foreclosure and sale. Its prayer is, that Tunis D. Melick may be decreed to pay the complainant the amount due him for principal and interest on the mortgage, and that in default thereof the said Tunis D. Melick, and all persons claiming from or under him, may be barred and foreclosed of and from all equity of redemption in the mortgaged premises.

To this bill, Tunis D. Melick and Sarah M. Melick, his wife, were made parties. Mrs. Melick was made a party as the assignee of a judgment recovered on the 6th of April, 1886, by James J. Bergen against Tunis D. Melick, for a debt incurred by Tunis D. Melick prior to the execution of the complainant's mortgage. Tunis D. Melick and Sarah M. Melick both answered the bill, setting up that the complainant's mortgage was made without consideration, and with the intent to defraud creditors. Mrs. Melick further, by way of cross-bill, set up that she was also the owner of a judgment recovered by Kline Melick against Tunis D. Melick on the 4th of June, 1878, and asked a decree establishing the priority of both judgments over the complainant's mortgage, for the reason above mentioned. The latter judgment was held by Peter W. Melick at the time the original foreclosure suit was begun, and he was made a party to that suit as owner of this judgment. Mrs. Melick's *status* in this suit depends, therefore,

upon the judgment recovered by Bergen, and that judgment was recovered after the decree in the original suit, and after the execution sale and the sheriff's deed to the complainant.

The deed from Tunis to Mrs. Studdiford conveyed to her an estate upon a simple trust, without any discretionary powers or active duties to be performed by the trustee. Under such a conveyance the incidents of the trust estate are a *jus habendi*, or right of actual possession in the *cestui que trust*, and also the *jus disponendi*, or right in the *cestui que trust* to require the trustee to convey the legal estate as the *cestui que trust* may direct: Lewin on Trusts, 18. The trust in its nature and quality is such as would be executed by the statute: Rev. Stats. 165, 166. The trust, as declared in the deed, is for the use of Clarence and Caroline, and their heirs and assigns forever, — words which, in a legal estate, would create a fee. In construing the limitation of trusts, courts of equity adopt the rules of law applicable to legal estates: *Cushing v. Blake*, 30 N. J. Eq. 689. On the assumption that the trustee took only a legal estate for life, Clarence and Caroline took an equitable estate in fee-simple. It is clear that the equitable estate vested in them did not terminate at the death of Mrs. Studdiford, even if she took by the deed only an estate for her life; for it is a maxim in equity that a trust once created shall not fail for want of a trustee, and the court will follow the estate into the hands of the legal owner, whoever he may be, and compel him to give effect to the trust by the execution of proper assurances, unless the legal estate has gone to a *bona fide* purchaser for value: 2 Lewin on Trusts, 833. In *Weller v. Rolason*, 17 N. J. Eq. 13, the testator directed his executor to invest the residue of his estate in the purchase of a house and lot to belong to his widow during her widowhood, and on her death to be sold, and the proceeds equally divided among his children. The executor made the purchase, and took a deed to himself as executor without words of inheritance. The executor and the widow having died, on a bill filed by the testator's children to have the lands applied to the purposes of the trusts declared in the testator's will, a decree was made against a purchaser from the grantor's heirs, having knowledge of the trust, that a conveyance be made in fee, and that the lands be sold, and the proceeds be applied to the trusts declared in the testator's will.

If Mrs. Studdiford took only a life estate by the deed, and the legal title reverted to the grantor on her death, the trust

estate in his children was not thereby destroyed. The lands would remain in the grantor's hands, charged with the trust.

Nor did the trust deed, upon a construction of all the limitations contained in it, grant to Mrs. Studdiford only an estate for life.

It is undoubtedly the common-law rule that an estate of inheritance cannot be created by deed without the word "heirs." In a will an estate of inheritance may pass without the word "heirs," for in a will a fee-simple doth pass by the intent of the deviser; but in feoffments and grants the word "heirs" is the only word that will make an estate of inheritance: Co. Lit. 8 b, 96. The rule of the common law that in the creation of an estate by deed the word "heirs" is necessary to pass the fee, has not been altered in this state by statute, nor has it been modified or relaxed by judicial construction. No synonym can supply the omission of the word "heirs," nor can the legal construction of the grant be affected by the intention of the parties: *Kearney v. Macomb*, 16 N. J. Eq. 189; *Adams v. Ross*, 30 N. J. L. 505; 82 Am. Dec. 237; *Sisson v. Donnelly*, 36 N. J. L. 432, 434. But it is also a maxim of the highest antiquity in the law that all deeds shall be construed favorably, and as near the apparent intention of the parties as is possible, consistent with the rules of law: 4 Cruise, 272. To create a fee, the limitation must be to "heirs"; but it may be made either in direct terms or by immediate reference, and it is not essential that the word "heirs" be located in any particular part of the grant: 4 Kent's Com. 6; 2 Preston on Estates, 2; Shep. Touch. 101; Com. Dig., tit. Estate, A, 2; 3 Bac. Abr. 425, tit. Estate, B. In *Doe v. Martin*, 4 Term Rep. 39, 65, the deed of settlement was "to the use of all and every the child or children of a marriage equally, share and share alike; if more than one, as tenants in common, and not as joint tenants; and if but one child, then to such only child, his or her heirs and assigns, forever." The words "his or her heirs," "considering," as was said by Lord Kenyon, "the whole settlement and the manifest intention of the parties," were allowed to operate as words of limitation on all the preceding words of the sentence.

Conveyances to uses are construed in the same manner as deeds deriving their effect from the common law: 4 Cruise, 258. The word "heirs" is necessary to create a fee. But where the conveyance is in trust, the trustee will take the legal estate in fee, although limited to him without the word

"heirs," if the trust which he is to execute be to the *cestui que trust* and his heirs. The words of limitation and inheritance in such case are connected with the estate of the *cestui que trust*, but are held to relate to the legal estate of the trustee, because without such construction the trustee would not be able to execute the trust: 1 Washburn on Real Property, 57; *Newhall v. Wheeler*, 7 Mass. 189; *Stearns v. Palmer*, 10 Met. 32; *Cleveland v. Hallett*, 6 Cnah. 403; *Welch v. Allen*, 21 Wend. 147; *Neilson v. Lagow*, 12 How. 98, 100; *North v. Philbrook*, 34 Me. 532. *Stearns v. Palmer*, *supra*, is very like the present case. By a deed of bargain and sale, lands were conveyed to A, B, and C, in trust for the inhabitants of the parish of S., for a burying-ground forever, "to have and to hold the said lands to the said A, B, and C, in trust for the use of the inhabitants of said parish, and their heirs forever, as a burying-yard." It was held that the deed conveyed to A, B, and C a fee-simple estate. Wilde, J. said: "The words 'their heirs' in the deed may be construed as applied to the immediate grantees, and ought to be so construed to effectuate the clear intention of the parties."

The rule of construction adopted in the foregoing cases applies as well to a grant upon a simple trust as to grants with special powers or active duties in the trustee, and is not a whit more liberal than that adopted by the king's bench in *Doe v. Martin*, *supra*, in the construction of successive limitations to effectuate the manifest intention of the parties. Conveyances upon simple trusts are regarded in law as grants for the benefit of the *cestui que trust*. In every such conveyance the intention of the grantor is to give the *quantum* of estate limited in the declaration of use. The estate of the trustee, and the use limited upon it, are parts of one entire conveyance, the trustee's estate being subsidiary to the purposes of the trust. A construction which will apply words of inheritance in the trust to the trustee's estate is absolutely necessary to give effect to the intent of the grantor. Our statute, which extends to every person to whom the use of lands is given, granted, limited, released, or conveyed by deed, grant, or any other legal conveyance whatsoever, and converts the equitable estate into a legal estate, should have great weight, if not a controlling effect upon the construction of a deed to uses within its purview: Rev. Stats., p. 165, sec. 66. A use expressed in words of inheritance demonstrates that the grantor by his deed intended to convey a fee. The statute declares that the grantees

to whom the use is given, limited, granted, or conveyed shall be deemed in as full and ample possession to all intents, constructions, and purposes as if such grantees, their heirs and assigns, were possessed thereof by solemn livery of seisin and possession. Unlike the English statute of uses, 27 Hen. VIII., c. 10, our statute acts upon the use granted, without referring to the trustee's estate, and converts the former into a legal estate.

There is nothing in *Adams v. Ross*, *supra*, or *Kearney v. Macomb*, *supra*, contrary to this view. In *Adams v. Ross*, *supra*, the word "heirs" was neither in the granting part of the deed nor in the *habendum*. It was found only in the covenants for title annexed to the grant. Covenants of warranty or for title are mere incidents of the grant, designed for indemnity or security for the estate granted. They can neither enlarge nor narrow the grant, and will themselves be restrained and limited to the estate conveyed: Com. Dig., tit. Estate, A, 2; *Clanrickard v. Sidney*, Hob. 273; *Seymour's Case*, 10 Coke, 97; Rawle on Covenants for Title, 199, 415, 524. The decision in *Adams v. Ross*, *supra*, in this court was expressly put upon the ground that covenants for title were no part of the conveyance. The error of the supreme court, for which its judgment was reversed, was in calling in aid covenants for title to enlarge the grant. In *Kearney v. Macomb*, *supra*, the deed was to A. K. K., his legal representatives and assigns, to hold the same and the proceeds thereof upon the trusts and conditions set forth in an antenuptial contract. Neither the deed nor the antenuptial contract contained the word "heirs." In both these cases the words indispensable to create a fee in a grant were entirely wanting, and there was no room for construction. In *Weller v. Rolason*, *supra*, reformation of the deed was necessary. The deed did not contain the word "heirs," nor did the trust appear in any way in it.

Price v. Sisson, 13 N. J. Eq. 168, affirmed 17 Id. 475, decided that a conveyance to grantees and their heirs for the use of the grantees and their heirs, in trust for certain persons beneficially interested, did not vest the legal estate in the beneficiaries, because of the common-rule that when a use is limited upon a use the statute executes only the first use. In the deed to Mrs. Studdiford, the first and only use declared is for the beneficiaries, Clarence and Caroline, and their heirs, and all the authorities, ancient and modern, agree that the statute executes the first use and converts it into a

legal estate, except where the powers and duties conferred upon the donee to uses are such as require in him the legal estate for their discharge.

Under the trust deed, the children of Tunis took an equitable estate in fee-simple, and Mrs. Studdiford, as trustee, a legal estate in fee, and there was no estate to revert to Tunis on the trustee's death. By the statute, the legal estate of the trustee became vested in the *cestuis que use*. The complainant, as purchaser under the foreclosure decree, to which the children of Tunis were parties, acquired the estate of the mortgagor, and also the fee in the equity of redemption. This bill was unnecessary to perfect the complainant's title under the original foreclosure suit. Indeed, in any aspect, the prayer of the bill, which is, that Tunis redeem the complainant's mortgage or be foreclosed, is inappropriate. If any relief by bill was needed, the prayer should have been that Tunis convey to the complainant as owner of the equitable estate, and a decree for a conveyance would have been as of course.

A decree dismissing the complainant's bill for this reason would be inequitable. The defendants' opposition to the allowance of a writ of assistance, on the ground that the complainant's title under the foreclosure was imperfect, and the denial of the writ, for that reason, cast a cloud upon the complainant's title. The defendants did not demur or object to the bill. The complainant made Mrs. Melick a party to this suit. By her answer, and a cross-bill, she set up that the mortgage held by the complainant was made by her husband, without consideration, for the purpose of defrauding his creditors. The complainant answered the cross-bill, joining issue on the allegations in it. The bill may, and should under the circumstances, be treated as a bill by the complainant to remove a cloud upon his title.

The master found against the defendants on the merits, and advised a decree for the complainant. The burden of proof is upon the defendants. The testimony is conflicting and unsatisfactory, and in some respects unreliable. The evidence was taken orally, in the presence of the master, with opportunity to see and observe the demeanor of the witnesses. On a consideration of the whole case, as presented by the testimony, I find no reason to reverse the finding of the master, and the decree advised by him should be affirmed.

USE OF WORD "HEIRS" IS NOT INDISPENSABLE TO VEST A TRUSTEE with an estate in fee. The estate granted to a trustee is measured and limited by the trust created. It will be treated as an estate in fee if such construction is necessary for the purposes of the trust, though the word "heirs" is not used; and will, on the other hand, be regarded as less than an estate in fee, though limited to the trustee and his heirs, if the complete execution of the trust does not require an estate in fee: *Perry on Trusts*, sec. 312; *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390; *Steacy v. Rice*, 27 Pa. St. 75; 67 Am. Dec. 447; *Ellis v. Fisher*, 3 Sneed, 231; 65 Am. Dec. 52. Except in limiting or creating an estate in trust, the word "heirs" is indispensable to the creation of an estate in fee-simple: *Adams v. Ross*, 30 N. J. L. 505; 82 Am. Dec. 237, and note.

BRANDS v. DE WITT.

[44 NEW JERSEY EQUITY, 545.]

HEIR AT LAW MAY RELEASE TO HIS FATHER, for a sufficient consideration, all the share which he would otherwise acquire in the latter's estate on his death; and such release will estop such heir from claiming any interest in as one of the heirs at law of his father.

STATUTE OF FRAUDS. — RELEASE MUST BE IN WRITING when by it an heir at law relinquishes all right to claim the estate which otherwise would vest in him on the subsequent death of his ancestor.

George A. Angle, for the appellants.

C. H. Beasley, and Shipman and Son, for the respondents.

VAN SYCKEL, J. David Brands died intestate in January, 1883, seised in fee of a farm containing about 117 acres of land, and some personal estate. His seven children survived him.

Isaac, one of his sons, administered upon the personal estate and sold it.

In November, 1883, it was agreed that the real estate should be sold at public sale, and that all the children would join in making a conveyance of it to the purchaser. The farm, at that sale, was struck off to Abram Brands for thirty-eight dollars per acre, and he signed the conditions of sale. On the day of the sale, and after the sale, Isaac, as he alleged, discovered in an old desk, which he had purchased at the sale of the intestate's goods, three releases to the intestate, one executed by his son Jacob, one by his son Abram, and one by James.

Two of the releases purported to be in consideration of land conveyed to them by their father in his lifetime, and the third in consideration of the sum of two thousand five hundred dollars.

In the releasing part, each one "releases, discharges, and

forever quitclaims all right, title, interest, or claim whatsoever to him, the said David Brands, and to his other children and heirs at law, of all the estate, both real and personal, that may be left at the decease of said David, the releasor being fully satisfied and content, on the reception of the above-mentioned deed, for all the legacies that now or ever hereafter might descend to him from the estate of said David, and that all of the estate of said David, at the time of his decease, may be divided among his other children and heirs at law, or otherwise, without any claim or demand, either by himself, his heirs, executors, or administrators.

Upon the production of these releases, the other children claimed that Jacob, James, and Abram were thereby excluded from any share in the intestate's estate, and thereupon James and Jacob refused to execute the deed of conveyance for the farm sold to Abram. The other children executed a conveyance to Abram, but he refused to accept it because all had not joined in it.

On the 24th of May, 1884, James filed a bill in chancery for the partition of said lands, to which all the heirs at law were parties. After the defendants to said bill had filed their answers, an agreement in writing, dated September 6, 1884, was entered into by all the children except Mrs. De Witt, by the terms of which the intestate's estate was to be equally divided among all the children of decedent, notwithstanding said releases. In consideration thereof, Abram signed an agreement to take the farm at thirty-eight dollars per acre, which it was then understood among them was a larger price than could otherwise have been obtained for it.

Thereupon, in accordance with said agreement, the partition suit, by consent of all parties, was discontinued; costs were paid to Mrs. De Witt; and James Brands, for himself and Jacob Brands, executed the conveyance for the farm and delivered it to Abram, who accepted it, and gave his obligations for the purchase-money.

In the court below, the validity of the releases was upheld, and a decree made that Mrs. De Witt, Isaac Brands, Catharine Green, and Hannah Reed were each entitled to one fourth of the estate, to the exclusion of the three who had released. Costs were allowed to the several parties out of the proceeds of sale of the land.

James Brands and Abram Brands appealed from this decree because they were denied a share of the estate, and Mrs.

De Witt appealed because costs were decreed out of the fund.

I agree with the vice-chancellor that an heir at law may, for a sufficient consideration, release to his father the share which he might have, at the parent's decease, in his estate, either real or personal, so that he will be thereby estopped from establishing any claim thereto as one of his heirs at law or next of kin.

In *Havens v. Thompson*, 23 N. J. Eq. 321, Chancellor Zabriskie, in commenting on the cases of *Quarels v. Quarels*, 4 Mass. 680, and *Kenney v. Tucker*, 8 Id. 143, in which such releases were held to be binding, said: "That whether an agreement by parol, or in writing without seal, by a son to his father, on receiving advancement in money, that it shall be in full of the son's share of the father's real estate at his death, can have any effect, was questionable."

He hesitated to adopt a rule which would give effect to parol testimony in cases of such importance, and he reserved the question until the final hearing of the case.

Chancellor Runyon decided the case on final hearing, and gave full effect to the agreement to release: *Havens v. Thompson*, 26 N. J. Eq. 383.

Vice-Chancellor Van Fleet, in *Green v. Hathaway*, 36 N. J. Eq. 471, says: "The justice of this doctrine is obvious; it is designed, in the first place, to compel a child to abide by its promise, and thus prevent the expectation of the father from being disappointed, who, but for his trust in the promise, would have made a will; and in the second place, to secure equality among those who have equality of right. But such agreements, when they concern lands, are, like others, subject to the statute of frauds, and unless they are in writing, cannot be enforced." This we consider to be the correct rule, and the reason for it. The English cases support this view: *Hancock v. Hancock*, 2 Vern. 665; *Lockyer v. Savage*, 2 Strange, 947; *Medcalf v. Ives*, 1 Atk. 63; *Heron v. Heron*, 2 Id. 160.

I think the preponderance of evidence is against the contention on behalf of Isaac, Catharine, and Hannah, that the agreement to make an equal division was executed by them on condition that it was not to be effective until it was signed by Mrs. De Witt.

It was very soon thereafter performed, on the part of Abram and James, who represented the share of Jacob.

The deed was executed and delivered to Abram, and the

partition suit of James was discontinued, with costs to Mrs. De Witt.

The evidence of Mr. Angle, the solicitor for Abram Brands, is, that he drew the agreement, and was present at the execution of it; that it was expressly stated, and understood by all who signed it, that Mrs. De Witt would not sign it; and that Abram said, in the presence of all of them at that time, that he would settle with Mrs. De Witt himself. This is not denied by Abram, who was called as a witness after this testimony was given.

The agreement should be enforced as against those who executed it, but it cannot affect the rights of Mrs. De Witt.

The result will be, that Mrs. De Witt is entitled to one fourth of the estate, and the other children to one seventh each.

The difference between the one fourth and the one seventh must be taken out of the one seventh to which Abram is entitled, and paid to Mrs. De Witt. This is in accordance with the obligation which Abram assumed at the settlement.

In estimating the sevenths, the payments provided for in the agreement of September 6, 1884, and also the costs in the court below, and the costs of the appellants, Abram, James, and Jacob, in this court, must first be deducted from the fund.

In estimating the one fourth to which Mrs. De Witt is entitled, only the costs in the court below and the costs of said appellants in this court must first be deducted from the fund. The appellants, Abram, James, and Jacob, are entitled to costs in this court, to be paid out of the fund. The appeal of Mrs. De Witt is dismissed, without costs. The decree should be reversed, and the case remitted, that an account may be taken as hereinbefore directed.

CONVEYANCE OR INCUMBRANCE BY HEIR APPARENT of the estate, which is to vest on the death of his ancestor: See *Trull v. Eastman*, 3 Met. 121; 37 Am. Dec. 126, and note; *Butler v. Duncan*, 47 Mich. 94; 41 Am. Rep. 711, and note; *Bayler v. Commonwealth*, 40 Pa. St. 37; 80 Am. Dec. 551.

IN THE MATTER OF THE LUNACY OF MARY ANN LINDSLEY.

[44 NEW JERSEY EQUITY, 564.]

RETURN TO AN INQUISITION IN THE NATURE OF A WRIT DE LUNATICO INQUIRENDO SHOULD SHOW whether the individual is so bereft of reason as to warrant his being deprived of power over both his person and his estate. A return that he is an idiot, lunatic, or *non compos mentis*, or of unsound mind, is sufficient, for each of those terms imports such a deprivation of sense as renders the sufferer unfit for self-control as well as for the management of his affairs. Neither of these words is absolutely essential. Their place may be supplied by words of equivalent import.

UNLESS AN ALLEGED LUNATIC IS SHOWN TO BE UNFIT FOR THE GOVERNMENT OF HIMSELF by the return to the writ *de lunatico inquirendo*, the court will not place him and his estate under guardianship.

Ludlow McCarter, for the appellant.

Henry S. Harris, for the respondent.

DIXON, J. On the petition of Parmelia L. Nichols, a commission issued out of chancery directing an inquiry "whether Mary Ann Lindsley is a lunatic or of unsound mind, so that she is not fit for the government of herself, her lands and tenements, goods and chattels." To this an inquisition was returned, certifying "that Mary Ann Lindsley is not a lunatic, but that her mind is impaired by age and other causes, and that she is not capable of managing her own affairs." The chancellor set aside this inquisition because it failed to answer the question put by the commission, pointing out, as one defect, the omission to state that Mrs. Lindsley's incapacity to manage her affairs arises from the condition of her mind. From the chancellor's order the petitioner appealed to this court, insisting that the inquisition, when fairly interpreted, and especially in the light of certain statements of the jury returned informally with the inquisition, does signify that Mrs. Lindsley's incapacity to manage her affairs is attributable to the impairment of her mind. We do not deem it necessary to pass upon this claim of the appellant, for, assuming it to be well founded, there still remains a defect in the inquest which justifies the chancellor's order.

The inquiry directed was, whether Mrs. Lindsley was a lunatic or of unsound mind, so as to be unfit for the government of herself, her lands, etc. The response, even as interpreted by the appellant, does not touch the question whether she is

fit for the government of herself. We think that, under the laws of this state, mental incapacity to that extent must be found in proceedings like the present.

It is clear that, at the time of the Revolution, the English court of chancery required that the return should show that the individual was so far bereft of reason as to justify his being deprived of power over both his person and his estate. A return that the party was an idiot, or a lunatic, or *non compos mentis*, or of unsound mind, was sufficient, because each of those terms imported such a deprivation of sense as rendered the sufferer unfit for self-control as well as for the management of his affairs: *Ex parte Barnsley*, 3 Atk. 168; 1 Collinson on Lunatics, 148; Shelford on Lunatics, *108. These words were not absolutely essential, but if omitted, words of equal significance were required, Lord Hardwicke saying (3 Atk. 171): "It is not a variance in the words, but in the sense and meaning, that will quash the inquisition." Our first statute, after the Revolution, was "An act for supporting idiots and lunatics, and preserving their estates," passed November 21, 1794 (Patterson's Rev. Laws, 125), which was evidently an adaptation to our institutions of chapters 9 and 10 of 17 Edward II., *de Prerogativa Regis*: Shelford on Lunatics, 315. Although this enactment, by its terms, includes only idiots and lunatics, yet in construction, it no doubt should embrace those *non compos mentis*, or of unsound mind, to whom its prototype had been judicially extended. Following this came the supplement of March 1, 1804 (Bloomfield's Comp. Laws, 117), which directed that all cases of idiocy or lunacy should be determined by an inquest on a commission of idiocy or lunacy issued by the chancellor; that the proceedings should be filed with the surrogate of the county in which the idiot or lunatic resided, and that the orphans' court of that county should appoint a guardian or guardians, who should have the care and provide for the safety of such idiot or lunatic, his or her lands, tenements, goods, and chattels. Our existing statute, passed February 28, 1820, is substantially the same: Elmer's Digest, 237; Rev. Stats. 601. This state of the law plainly leads to the conclusion that the mental imbecility to be established is such as calls for guardianship over the person as well as over the estate of the imbecile.

The form of the judicial inquiry under these statutes, commencing with that of 17 Edward II., is to the same effect.

The ancient writ issued to inquire whether the party "fatuus et idiota existit: ita quod regimini sui ipsius, terrarum, tene-mentorū, et cattallorum suorum, non sufficit": 1 Collinson on Lunatics, 117. So the commission, which in England superseded the writ, and which has been adopted here, invariably covers the idea of the fitness of the alleged imbecile for self-government. Such a practice would not have obtained and have been observed so persistently unless this idea had been deemed important; and I think there is no case in our reports where an inquisition has been accepted and acted upon, which did not, either by the technical words above mentioned, or by some other clear form of expression, indicate that the subject of the inquest was incapable of governing himself as well as his affairs: *Covenhoven's Case*, 1 N. J. Eq. 19; *Van-auken's Case*, 10 Id. 186; *James's Case*, 85 Id. 58.

In *Perrine's Case*, 41 N. J. Eq. 409, 411, Chancellor Runyon said that it is enough to warrant the interference of the court, if, from any cause, whether by age, disease, affliction, or intemperance, a person has become incapable of managing his own affairs; and he referred for support to Lord Eldon in *Gibson v. Jeyes*, 6 Ves. 266, and Chancellor Kent in *In re Barker*, 2 Johns. Ch. 232. But I apprehend that in these cases the attention of the judges was turned more to the source and nature of the mental imbecility than to its extent, and that they must not be understood as holding that weakness of mind which, though it rendered a person incapable of managing his affairs, did not amount to idiocy or lunacy, or unsoundness of mind (in the technical sense of those terms), and did not deprive him of the power of governing himself, would justify a court in placing him and his estate under guardianship. The opinions of Lord Lyndhurst in *In re Holmes*, 4 Russ. 182, and of Chancellor Walworth in *In re Morgan*, 7 Paige, 236, indicate that such is not the law, either in England or New York. Lord Eldon himself, in *Sherwood v. Sanderson*, 19 Ves. 280, 286, declared it to be settled that if the jury merely find the incapacity of the party to manage his affairs, and will not infer, from that and other circumstances, unsoundness of mind (which he said has the same effect as idiocy or lunacy), though the party may live where he is exposed to ruin every instant, yet upon that finding the commission cannot go on.

For the reason, therefore, that the jury did not find that Mrs. Lindsley was an idiot, or a lunatic, or of unsound mind,

or that her mind was so impaired as to render her incapable of governing herself as well as her property, we think that the inquisition did not justify the appointment of a guardian both of her person and of her estate, as the statute requires, and hence that it was properly set aside.

INQUISITIONS OF LUNACY AND THE RETURNS THEREON: See *Beaumont's Case*, 1 Whart. 58; 29 Am. Dec. 33, and note; *Kimball v. Flat*, 29 N. H. 110; 75 Am. Dec. 213; *Dutcher v. Hill*, 29 Mo. 271; 77 Am. Dec. 572.

INDEX TO THE NOTES.

- ACCIDENT**, presumption of negligence, when arises from, 792-795.
- ALLUVIAL ACCRETIONS**, apportionment of, 114.
- APPEAL**, effect of on the judgment appealed from, 389.
- ASSAULTS**, liability of keepers of places of public resort for not protecting guests from, 735-737.
- ASSIGNMENT** for benefit of creditors, bare intent to delay creditors will not avoid, 26.
- BAILEMENT**, negligence is presumed when property is returned in an injured condition, 138.
- BOND**, delivered on condition that other persons shall join as sureties therein, 336.
- CARRIERS**, delivery by, what sufficient to terminate their liability, 356.
duty to protect passengers from dangers not ordinarily incident to travel, 735.
duty to protect passengers from fellow-passengers, 735-737.
duty to protect passengers from injury by third persons, 734.
duty to protect passengers from gamblers, 736.
duty to protect passengers from robbers, 736.
- CHILD**, admission of, in evidence, to show resemblance between and alleged parent, 224.
- CIVIL DEATH** defined, 380.
disability of person suffering, 381-383.
divestiture of title by, does not take place till office found, 382.
English statutes respecting, 380.
law of, in these United States, 380.
of one who becomes a monk, 383.
suits against party who has suffered, 382.
wife of person civilly dead may sue in her own name, 383.
- CONVERSION** by mistake, duty of injured person to make the damages as light as possible, 364, 365.
- CORPORATION**, unpaid calls, liability of transferee of stock for, 838-840.
- CO-TENANCY**, deed in severalty by one of several co-tenants, entry under, whether should be regarded as adverse, 437.
release by one of several co-tenants, 200.
- CRIMINAL LAW**, larceny, felonious intent, from what inferred, 47.
malice, from what implied, 780.
reasonable doubt, what is, 61.
self-defense, what facts will sustain plea of, 61, 780.
- DAMAGES** by fire, duty of injured person to extinguish fire if he can, 365.
duty of injured person to lessen, 365.

DAMAGES from breach of contract of hiring, duty of person discharged to lessen damages by seeking employment, 365.

from conversion of property by mistake, duty of injured person to repurchase property and diminish his damages, 365.

DEFINITION of admissions, 242.

of confessions, 242.

of civil death, 380.

of inquests of office, 382.

DEED, acknowledgment of by married woman, sufficiency of, 643.

acknowledgment of, impeaching certificate of, 643.

ESCHEAT, effect of in England, 381.

EVIDENCE, confessions, burden of showing whether they were voluntary, 244.

confessions by intoxicated person, 249.

confessions defined, 242.

confessions, distinction between and admissions, 242.

confessions, extraneous facts ascertained through inadmissible confessions, 250.

confessions, fear, what will render inadmissible, 243.

confessions, foundation for admission of in evidence, 245.

confessions, general admissibility of, 242.

confessions, given under promise not to divulge, 242.

confessions, induced by appeal to moral and religious sentiments, 248.

confessions, induced by duress, 248.

confessions, induced by deception or artifice, 249.

confessions, induced by fear or hope, 245.

confessions, induced by promise of person in authority, 246.

confessions, induced by promise of person not in authority, 247.

confessions, induced by promise to be allowed to turn state's evidence, 251.

confessions, induced by torture, 248.

confessions, inducements and promises, rendering inadmissible, instances of, 246.

confessions, inducements or tender confessions inadmissible must refer to escape from punishment, 247.

confessions, instructions to be given jury concerning, 244.

confessions made by person under arrest to officer in whose custody he is, 243.

confessions, made by person illegally imprisoned, 244.

confessions made during sleep, 249.

confessions, question of admissibility of is for the court, 244.

confessions, second, where first was inadmissible, 249.

confessions, voluntary, must be shown to have been before they can be received in evidence, 244.

confessions, voluntary, what deemed to be, 243.

confessions, when inadmissible, 245.

confessions, whole must be admitted or none, 251.

confessions, without proof of the *corpus delicti*, 251.

FACTOR, emergency which will justify his disobeying his instructions, 37.

FIXTURES, owner of land may reimpress character of personality on, 898.

persons acquiring interests in or liens upon real estate with knowledge that fixtures are subject to prior liens or claims, 898.

FORFEITURE, for treason or felony, 380, 382.

GIFT CAUSA MORTIS, giver must part with all control, 169.

GIFT, delivery is required to perfect, 300.

HANDWRITING, genuineness of, what evidence is competent on subject of, 177.

HEIRS, estate in fee may vest in trustee without use of this term, 306.

IMPROVEMENTS, owner of land, when chargeable for improvements made thereon by a *bona fide* possessor thereof, 495.

parol contract to pay for, 497.

placed on land by one believing himself to be the owner, 495.

placed on land of third person generally belong to him, 495.

placed on land under a contract to purchase which is void for non-compliance with the statute of frauds, 496.

INN-KEEPERS, liability of, for not protecting guests from violence, 732.

INQUESTS OF OFFICE, necessity of, to establish an *executor*, 382.

not indispensable to forfeiture for high treason, 382.

INSURANCE, arbitration, provisions in policy requiring, 341.

JUDGMENT against non-resident can operate in *rem* only, 182.

appeal from, effect on, 339.

estoppel, when judgment is ambulatory in its nature, 92.

in trespass, effect of as *res judicata*, 310.

void, remedies against, 792.

JURISDICTION, based on publication or constructive service of process, 182.

decoying person within, to make service of process, 180.

equity jurisdiction over non-residents, 189.

fraud in procuring, how may be taken advantage of, 180.

over alien enemies, 190.

over foreign administrator or guardian, 184.

over lands in another state, 182.

over non-resident stockholders, 184.

over non-residents temporarily within the state, 181.

over persons and property situate beyond the state, 180.

over property of non-residents, and how obtained, 181.

over property of non-residents must be in *rem*, 182.

over suits against receivers appointed in other states, 185.

presumptions in favor of, 79.

receiver appointed in another state, 185-189.

state laws, operation of is restricted to state limits, 179.

to enforce performance of contract made in another state, 180.

to order sale of land situate in another state, 182.

LIBEL, evidence of other offenses not connected with that charged, 332.

innuendo, office of, 331.

of public officers, 331.

LOST WRITINGS, recovery on, by action or suit, 110.

MARRIED WOMEN, acknowledgment of deed by, is essential to its validity, 642.

acknowledgment of deed by, sufficiency of, 643.

MONE, civil death of, 383.

MORTGAGE, chattel, authorizing mortgagee to sell or retain possession, 24.

MUNICIPAL CORPORATION, acts of officers of, when do not bind the corporation, 130.

- MURDER**, deliberation, instructions regarding, 31.
 deliberation, length of time required for, 31.
 surgical operation causing death to injured party, 31.
- NEGLECTANCE**, accident, whether establishes, 792.
 burden of proof, on whom rests, 792.
 elevator, fall of, whether establishes, 794.
 presumed from fall of building, 793.
 presumed from fall of elevator, 794.
 presumed from railway accident, 793, 794.
 presumed from what accidents, 793-795.
 ruinous building, fall of, establishes, 793.
- NON-RESIDENTS**, chancery jurisdiction over, 180.
 courts, when have no jurisdiction over persons of, 179.
 decoying within state to serve process on, 180.
 property of, jurisdiction over, how obtained, 182, 183.
 property of, situate within the state, 181.
 quieting title against, 182.
 stockholders in corporations, 184.
 temporarily in state or country, 181.
 waiver of questions of jurisdiction by submitting to courts, 180.
- OFFICERS**, acts of, done *colore officii*, when not binding, 130.
 acts of, when private and when official, 130.
 misconduct of, in office, 131.
 of city, acts of, when not binding, 130.
 of township, what acts of are binding on the township, 131.
 unauthorized acts of, which do not bind the public, 131.
- OPERA**, whether to be regarded as a theatrical performance, 790.
- PARENT AND CHILD**, custody of child, father's agreement concerning, 684.
 enfranchisement of child, from what inferred, 684.
 father is entitled to service of minor child, 684.
 father is liable for support of, 688.
 father's right to emancipate minor, 684.
 mother's right to custody of child on death of father cannot be impaired by his agreement, 688.
- PENALTIES**, acts punishable by, whether void, 196.
- POWER**, donee of, control of courts over, 885.
 donee of, principles which must regulate acts of, 886.
 donee of, rules limiting his action, 886.
- PRESUMPTION** of negligence, accident, when raises, 793.
 of negligence against carriers, 794.
 of negligence from fall of building, 793.
 of negligence from fall of elevator, 794.
 of payment, what will rebut, 811.
- PRINCIPAL AND AGENT**, emergency which will justify disobedience to instructions, 37, 38.
- PRINCIPAL AND SURETY**, alteration of contract without assent of surety, 458.
 new duties imposed on principal, when will release surety, 459.
 new duties imposed on principal, when will not release surety, 458.
 principal, change in duties of, 459.
 principal, change in duties of, by legislature, 460.
 principal, change in duties of, right to make may be reserved, 459.

- PRINCIPAL AND SURETY**, principal, immaterial change in duties of, 459.
 sureties are entitled to stand on strict terms of their contract, 458.
 sureties are favorites of the law, 458.
- RECOVERERS**, actions by, beyond the state where appointed, 185-187.
 authority, territorial limitation of, 185.
 title of, is limited to the state where appointed, 185.
- RELEASE** by one of several co-tenants, 200.
- SALE** of goods, when complete, 237.
- SALOON-KEEPERS**, liability of, for not protecting guests from assault, 732.
- SHERIFF**, liability of, for levying on exempt property, 132.
 liability of sureties of, for levy on property of stranger to the writ, 132.
- SLANDER** by counsel in the course of a trial, 827.
 by witnesses in giving evidence, 825.
 uttered in judicial proceedings, 828.
- STATUTE OF FRAUDS**, improvements placed on lands under contract void for want of compliance with, 496.
- STATUTE OF LIMITATIONS**, municipal corporations, actions by, whether subject to, 649.
- TOWNSHIP**, acts of officers of, when not binding upon, 131.
- TREASON**, corruption of blood resulting from, 331.
 escheat of lands for, 331.
 forfeiture of property for, 330-332.
- TRUSTEE**, discretion of, control of courts over, 835, 836.
 discretion of, how must be exercised, 835.
 discretion of, rules for governing, 836.
 estate in fee, when vests in, 909.
- WILL**, parol evidence to show intent to omit child from, 303.
- WITNESSES**, liability of, for slander uttered in giving testimony, 825-828.

INDEX.

ACKNOWLEDGMENTS.

1. EVIDENCE TO IMPEACH THE ACKNOWLEDGMENT OF A DEED SHOULD BE OF THE CLEAREST, STRONGEST, AND MOST CONVINCING CHARACTER. It should be almost as strong as that required to correct an alleged mistake in a deed, and should not be loose, equivocal, or open to reasonable doubt or opposing presumptions. *Pickers v. Knissly*, 522.
2. WITNESS, COMPETENCY OF. — JUSTICE OF THE PEACE IS A COMPETENT WITNESS to impeach a certificate of acknowledgment signed by him; and his testimony may be received to prove that the grantor never appeared before him, nor acknowledged the deed. *Id.*

See MARRIED WOMEN, 5-7.

ADVERSE POSSESSION.

1. RIGHT ACQUIRED BY PRESCRIPTION IS AS PERFECT AS ONE ACQUIRED BY GRANT, and nothing that the person who has thus acquired it can do, and no acknowledgment that he may make, can take away from him the right which has in this way become vested in him. *Weed v. Flash*, 93.
2. ASKING FROM OWNER OF LAND LEAVE TO RAISE FLASH-BOARD IS ACKNOWLEDGMENT of such owner's superior right, and will rebut the presumption of a grant, and interrupt the acquiring of the right to use the flash-board. *Id.*
3. PAYMENT OF TAXES ON LAND IS NOT ACT OF POSSESSION, nor is it evidence of a possessory title. *Tillotson v. Prichard*, 95.

See CO-TENANCY, 1, 2.

AGENCY.

PRINCIPAL BOUND BY AGENT'S ACTS IN EMERGENCY. — Where an agent is directed to get a certain physician, but, being unable to procure him, employs another instead, the emergency is such as to bind the principal, though he told the latter physician when he arrived at his destination that his services were not required, as the trouble was over. *Bartlett v. Sparkman*, 35.

See INSURANCE, 8-10.

ALIENS.

See JURISDICTION, 1.

ARBITRATION.

See INSURANCE, 2, 3.

ASSAULT AND BATTERY.

See TRESPASS.

ASSIGNMENTS.

EQUITY WILL UPHOLD AN ASSIGNMENT OF WAGES expected to be earned in the future, but not under an existing employment or contract. *Edwards v. Peterson*, 207.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. RIGHT TO OPEN AND CLOSE. — Where plaintiff in attachment answers an interplea, and admits an assignment, but alleges that it is fraudulent and void, the burden is on him to prove it, and consequently he has the right to open and close, both in the introduction of evidence and in the argument. *Haskell v. Tipton Bank*, 22.
2. DECLARATIONS AS EVIDENCE. — WHERE VALIDITY OF ASSIGNMENT for the benefit of creditors is in issue, an attaching creditor may show a conversation had before the assignment, in which the assignor gave as a reason for assigning that he could then get a better settlement with his creditors. He may also prove conversations had with the assignor, in the presence of the assignee, shortly after the assignment, at a meeting of creditors, to effect a compromise. *Id.*
3. ESTOPPEL. — Where an attaching creditor is seeking to prove the invalidity of an assignment, and the assignor, prior to the assignment, has represented himself to be worth a large sum in excess of his liabilities, such creditor is not estopped by representing to other creditors, prior to the assignment, that in his opinion the assignor was solvent, and worth a large sum in excess of his liabilities and exemptions. *Id.*
4. ASSIGNMENT FOR BENEFIT OF CREDITORS is not fraudulent when the embarrassed creditor making it intends only such delay and hindrance to his creditors as would follow as an incident to the assignment. *Id.*
5. DEMURRER TO EVIDENCE is properly denied when there is some evidence, though slight, justifying the submission of the good faith of the parties to the assignment. *Id.*

ATTACHMENT.

1. LOSS OF MONEY PAID TO SHERIFF UNDER ATTACHMENT OR GARNISHMENT, resulting from the subsequent absconding of that officer, must be borne by the plaintiff. *In re Dawson*, 346.
2. GARNISHMENT IS A STATUTORY PROCEEDING based upon contract relations, or upon equities growing out of or created by such relations. The form of the action under which the proceedings may be prosecuted against defendants has little or nothing to do with the true character and relation existing between the parties. The garnishee defendants cannot be held for property of the principal defendants in their possession as for a wrong, unless their possession was wrongful as between them and the principal defendants at the time the writ was served, no matter in what form of action the statute may authorize the proceeding to be prosecuted, or the declaration permitted may indicate. *Lyon v. Ballentine*, 284.

See EXECUTIONS, 1.

ATTAINDER.

1. SENTENCE PRONOUNCED FOR A CAPITAL OFFENSE PLACED the offender in a state of attainder at the common law. *Avery v. Everett*, 368.

2. **PRINCIPAL INCIDENTS CONSEQUENT UPON AN ATTAINDER AT COMMON LAW** were forfeiture, corruption of blood, and an extinction of civil rights, more or less complete, which was denominated civil death. *Id.*
3. **INCIDENT OF CIVIL DEATH** attended every attainder of treason or felony at the common law; and the person attainted became disqualified from being a witness, from bringing an action, and from performing any legal function. *Id.*
4. **ATTAINTED PERSON WAS NOT DIVESTED OF HIS LANDS UNTIL OFFICE FOUND;** he could devise them, subject only to the right of entry for the forfeiture, and could be either a grantor or grantee, and the grant would be good against all persons other than the king. His body could be taken in execution, subject to the paramount claims of public justice. He could be sued, but could not sue; he could contract, but could not require the courts to aid him in enforcing his contracts. *Id.*
5. **CIVIL DEATH DID NOT OF ITSELF DIVEST THE OFFENDER OF HIS LANDS,** as a general rule. *Id.*
6. **CIVIL DEATH, RESULTING FROM ENTERING INTO RELIGION AND BECOMING A PROFESSED MONK,** differed from civil death occasioned by a sentence for crime, in this, that in the former case the monk renounced all secular concerns, and held himself freed from the obligations resting upon him as a member of civil society. He was therefore treated as dead in fact, and as having surrendered all his civil rights. *Id.*
7. **CONSEQUENCES OF CIVIL DEATH, UNDER THE STATUTES OF NEW YORK,** are no greater than at common law, and do not include the divesting of the estate of the criminal. Hence if lands devised to him were, on his dying without issue, to vest in another, they do not so vest on his civil death. *Id.*

ATTORNEYS AT LAW.

1. **ATTORNEY MAY BE SUMMARILY COMPELLED BY COURT TO PAY OVER MONEY COLLECTED BY HIM** only when the relation of attorney and client in the transaction exists between him and the petitioner; and if, on the application for such a rule, an issue of fact is raised as to whether the relation exists, the attorney is entitled to a trial by jury. *In re Kennedy*, 724.
2. **ATTORNEY WILL NOT BE SUMMARILY COMPELLED BY COURT TO PAY OVER MONEY COLLECTED BY HIM,** when his answer to the rule convinces the court that the money was withheld in good faith, and believed to be no more than an honest compensation, but the petitioner will be remitted to his action at law. *Id.*
3. **IF AN ATTORNEY ACTS FOR SEVERAL CLIENTS, HE CANNOT TESTIFY WITHOUT THE CONSENT OF ALL,** and this is true as between his clients, or any of them, and third parties; but where the controversy is between the parties themselves, the rule does not obtain. *Michael v. Foll*, 577.

BAILMENTS.

1. **BAILER OF HORSE FOR HIRE IS LIABLE IN ACTION FOR TROVER,** when he hires him to be driven to one place and drives him to a different one, without the consent of the owner. *Malaney v. Taft*, 135.
2. **BURDEN OF PROOF OF NEGLIGENCE IS ON PLAINTIFF** in an action on the case for negligence against the bailee of a horse for hire, and is not shifted by merely showing that the horse was sound when delivered to

the bailee, and when returned was injured in a way that does not ordinarily occur without negligence. *Id.*

See WAREHOUSEMEN.

BANKRUPTCY.

See INSOLVENCY.

BASTARDY.

EVIDENCE. — IT IS ERROR IN BASTARDY PROCEEDINGS TO PERMIT INSPECTION BY JURY OF INFANT CHILD six weeks old, to enable them to judge from a comparison of its appearance, complexion, and features with those of the defendant, whether any inference could legitimately be drawn therefrom as to its paternity; to decide otherwise would establish an unwieldy, dangerous, and uncertain rule of evidence. *Clark v. Bradstreet*, 221.

See MARRIAGE AND DIVORCE.

BILLS OF LADING.

See COMMON CARRIERS.

BONDS.

1. **BONDS.** — IN JOINT OBLIGATION, VOLUNTARILY ASSUMED, EACH OBLIGOR OWES to the others the exercise of good faith for their joint interest. A confidential relation exists between them, each owes a duty to the others to disclose anything affecting the joint interest, and each represents the others in matters relating to the payment and discharge of their joint liability. *Green v. Rick*, 760.
2. **ALL CO-OBLIGORS IN JOINT BOND SECURED BY MORTGAGE ARE LIABLE** for the amount of the bond, although the purchaser of the land subject to the mortgage has discharged the latter by payment to the mortgagee of record, such payment having been made in good faith and without notice that the debt secured by the bond was payable to another; and in a suit against the obligors, in which such purchaser is made a party defendant, if judgment is had against the defendants generally, it will be vacated as to him and sustained against the other defendants, the obligors. *Id.*
3. **NOTICE.** — REFERENCE IN COUPONS TO THE MORTGAGE AND BONDS, and in the bonds to the terms and conditions of the mortgage, charges the holders of both coupons and bonds with notice of the provisions contained in the instruments to which reference is made. *McClelland v. Norfolk R. R. Co.*, 397.
4. **NEGOTIABILITY OF COUPONS**, THOUGH DETACHED FROM THE BOND, IS DESTROYED if they contain a reference to other instruments, and from such instruments it appears that the time of payment of such coupons is subject to a contingency over which their holders have no control. *Id.*
5. **A COUPON, TO BE NEGOTIABLE**, must provide for unconditional payment to a person, or order or bearer, of a certain sum of money at a time capable of exact ascertainment. *Id.*
6. **WHERE A MAJORITY OF BOND-HOLDERS WERE AUTHORIZED, IN CASE OF DEFAULT**, to waive such default, and to instruct the mortgage trustees to waive it, but no action on the part of the bond-holders or trustees was to affect any subsequent default, the bond-holders cannot anticipate a de-

fault, nor, in advance of such default, can they give the trustees a valid instruction to postpone the payment of interest five years. *Id.*

See SURETIESHIP.

CHARITIES.

1. TRUE TEST OF LEGAL PUBLIC CHARITY IS OBJECT SOUGHT TO BE ATTAINED, the purpose to which the gift is to be applied, and not the motive of the donor. *Fire Ins. Co. v. Boyd*, 745.
2. INSURANCE PATROL COMPANY IS PUBLIC CHARITY when the object of its incorporation is to protect and save life and property in and contiguous to burning buildings, it appearing that the company made no distinction in saving and protecting property between property insured and not insured, and that it was without capital stock or moneyed capital, and no profits or dividends were made and divided among the corporators, although it is supported by the voluntary contributions of fire insurance companies. *Id.*

CONFLICT OF LAWS.

See COVENANTS, 2.

COMMON CARRIERS.

1. TRANSPORTATION COMPANY IS COMMON CARRIER, AND IS RESPONSIBLE AS SUCH where, although it owns no railroad itself, nor any part of the route, it employs such lines of others, acting for itself alone, as it sees fit to use, and contracts to furnish every means of transportation upon the entire journey. *Merchants' D. T. Co. v. Bloch*, 847.
2. LIABILITY OF COMMON CARRIER MAY BE LIMITED IN ITS EXTENT BY EXPRESS CONTRACT; such limitation must be reasonable; it must not stipulate for exemption from liability for the consequences of the negligence of the carrier, its servants or agents. *Id.*
3. VOID STIPULATION IN CARRIER'S CONTRACT. — Where common carrier, having the whole contract for transportation, and reserving to itself the right to select its own lines, stipulates in an agreement for carriage of goods that the company alone upon whose line the goods may be lost or injured should be liable therefor, the effect of such stipulation would be to exempt such carrier from liability for the negligence of its agents, and is therefore void. *Id.*
4. SUBCARRIER OF TRANSPORTATION COMPANY, ACTING AS COMMON CARRIER, IS ITS AGENT, and not that of consignor or consignee. *Id.*
5. BURDEN OF PROOF IS UPON COMMON CARRIER, IN CASE OF LOSS, to show that such loss arose from a cause for which he was not responsible. *Id.*
6. CONDITION IN BILL OF LADING — EVIDENCE. — The fair and honest acceptance of a bill of lading, without dissent, raises a presumption that all limitations contained therein were brought to the shipper's knowledge, and agreed to by him. *Id.*
7. DELIVERY WHICH WILL DISCHARGE A COMMON CARRIER MAY BE CONSTRUCTIVE. *Tarbell v. Royal Ek. S. Co.*, 350.
8. TO CONSTITUTE A CONSTRUCTIVE DELIVERY, the carrier must, if practicable, give notice to the consignee of the arrival, and when this has been done, and the goods are discharged in the usual and proper place, and reasonable opportunity afforded to the consignee to remove them, the liability of the carrier as such terminates. *Id.*

8. DUTY OF CONSIGNEE TO RECEIVE AND TAKE GOODS is as imperative as the duty of the carrier to deliver them. He cannot, at his option, continue the stringent liability of the carrier, but must act promptly in taking the goods. If he does not, the liability of the carrier as an insurer, nevertheless, ends. *Id.*
10. CARRIER'S GENERAL DUTY IS NOT ESSENTIALLY VARIED OR LIMITED BY A STIPULATION IN THE BILL OF LADING that the goods are "to be delivered from the ship's deck (when the ship-owner's responsibility shall cease) at the port of New York," nor by a stipulation that the goods were "to be received by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed and stored, at the sole expense and risk of the consignee, in the warehouses provided for that purpose, or in the public store, as the collector of the port shall direct. *Id.*
11. CARRIER'S LIABILITY AS CARRIER WAS HELD TO HAVE TERMINATED when it appeared that he gave the consignee prompt notice of the arrival of the goods, and thereafter discharged them at the proper wharf, where they were suffered to remain three days. *Id.*
12. THOUGH CARRIER'S LIABILITY AS SUCH HAS TERMINATED BY A CONSTRUCTIVE DELIVERY OF THE GOODS, he remains answerable for the negligence of himself or his servants, whereby goods remaining in his possession are lost. *Id.*
13. CARRIER WHO WISHES TO WHOLLY TERMINATE HIS LIABILITY FOR GOODS MUST WAREHOUSE THEM; otherwise he is charged with a duty as bailee or warehouseman to take ordinary care of the property. *Id.*
14. EXCEPTION IN BILL OF LADING AGAINST LOSS BY THEFT WILL NOT RELIEVE THE CARRIER from liability for loss of goods resulting from his negligence in permitting them to be taken from his custody, after they had been constructively delivered to the consignee, by one who took them without intent to steal. This exception must be construed as operating only while the goods are in possession of the carrier as such under the bill of lading. *Id.*
15. WRONGFUL DELIVERY BY CARRIER. — Where defendant undertook to carry by water and deliver to plaintiff certain property belonging to the latter, but after the carriage was completed made no attempt to so deliver the property, but allowed the master of the vessel, who was his servant, and assumed to be a deputy United States marshal, to deliver the property, without the consent of the owner, to a third party, the act of so delivering the property to a third person is a tortious one on the part of defendant, and a wrongful conversion, for which trover will lie. *Gibbons v. Farrell*, 301.
16. WHEN CARRIER OF GOODS allows an officer to take the goods he is carrying, it is no defense against an action of trover for their value to show that the officer took them without also showing that he had a legal right to take them by virtue of his writ. *Id.*
17. WHEN CARRIER HAS ALLOWED AN OFFICER to take goods he is carrying, and in an action of trover seeks to show a better right to the property or to its control than the plaintiff's, the legal proceedings upon which the officer's writ or order is based should be introduced. *Id.*
18. INSTRUCTIONS — DEPARTURE FROM PETITION. — Where petition in action against railroad company for personal injury alleges negligence in not stopping a reasonable time for plaintiff to alight, and negligence in putting him off, also an assault on him by defendant's agent, and the in-

structions authorize a recovery upon finding the negligence alleged, but are silent as to the assault, they are not erroneous, as a departure from the petition, especially if they present the real issue made by the evidence. *Owens v. Kansas City etc. R'y Co.*, 39.

19. **WAIVER OF COMPETITION IN PASSENGER CONTRACT "TICKET."**—CONTRACT INDORSED ON RAILROAD PASSENGER TICKET for passage to a certain point and return, entered into between the railroad company and a passenger, containing a requirement that the ticket should be stamped by the company's agent at the point of destination, is a simple contract in writing, and such requirement may be waived by parol. To show such waiver, evidence that a person stamped the ticket for the return trip at a station other than that designated in the contract, and that such person was an authorized agent of the company, is admissible. *Taylor v. Seaboard etc. R. R. Co.*, 509.

20. **NEGLECTENCE—DAMAGES.**—IN ACTION AGAINST A RAILROAD COMPANY for injuries received in being negligently and forcibly pulled from the cars, the plaintiff is entitled to recover upon proof of the negligence, though an invalid, and the injuries may have been aggravated and rendered more difficult to cure by reason of ill health; and it is no defense to say that the injuries would not have occurred, or would not have been so great, had the passenger been in good health. *Owens v. Kansas City etc. R'y Co.*, 39.

21. **NEGLECTENCE—DAMAGES.**—IN ACTION AGAINST RAILROAD COMPANY for injuries received through its negligence, plaintiff may describe the injuries received, and the evidence cannot be excluded because plaintiff testifies that the nerves of her head, side, and leg were paralyzed. It is not in the nature of expert evidence. *Id.*

CONSTITUTIONAL LAW.

1. **PERSONAL LIBERTY.**—In all free and most civilized countries, people may assemble to parade together, or to form processions for political, religious, and social demonstrations, by day, or reasonable hours of night, with banners and paraphernalia, and with music of various kinds; and cities can possess no repressive power over these movements, except when they create public disturbances, or operate as nuisances, or create or manifestly threaten some tangible public or private mischief. *In re France*, 310.

2. **SALVATION ARMY.**—RELIGIOUS LIBERTY DOES NOT INCLUDE the right to introduce and carry out every scheme which persons see fit to claim as part of their religious system, but it is not legal to make any exceptions for or against the "Salvation Army," so called, because of its theories concerning practical work. It has the same right and is subject to the same restrictions, in its public demonstrations, as any secular body which uses similar means for drawing attention or creating interest; and whatever regulation is made regarding it must operate uniformly, under the same conditions, which must be fixed expressly and intelligibly, and not left to the caprice of any one. *Id.*

3. **SECTION OF PENAL CODE OF NEW YORK DECLARING THAT "NO PERSON CAN, BY REASON OF RACE, COLOR, OR PREVIOUS CONDITION OF SERVITUDE, be excluded from the equal enjoyment of any accommodation, facility, or privilege furnished by innkeepers or common carriers, or by owners, managers, or lessees of theaters or other places of amusement, by teachers and officers of common schools and public institutions of learning,**
AK. ST. REP., VOL. VI.—50

or by cemetery associations," is constitutional. The statute is a valid exercise of the police powers of the state. *People v. King*, 399.

See MUNICIPAL CORPORATIONS, 10-13.

CONTRACTS.

1. FACT THAT PARTY COULD NOT READ OR WRITE DOES NOT PREVENT APPLICATION OF RULE THAT WRITTEN CONTRACT DULY EXECUTED, after its contents were explained, cannot be overthrown upon the mere opposing testimony of one party, contradicted by the oath of another, especially where the latter is a disinterested person. *North v. Williams*, 608.
2. ACCEPTANCE OF OFFER WITHOUT OBJECTION OR CONDITION BINDS PARTY ACCEPTING, and the party making the offer has the right to understand that the acceptance was according to the terms of the offer. *Drew v. Edmunds*, 122.
3. GENERAL RULE THAT TIME IS NOT DEEMED BY COURTS OF EQUITY as being of the essence of contracts has well-defined exceptions, which are as constantly recognized as the rule itself. And when the parties have expressly treated time as of the essence of the contract, or if it necessarily follows from the nature and circumstances of the agreement that it should be so regarded, such courts will not lend their aid to enforce it specifically, regardless of the limitation of time. *Coleman v. Applegate*, 417.
4. IT IS COMPETENT FOR PARTIES TO SIMPLE CONTRACT IN WRITING, BEFORE ANY BREACH of its provisions, either altogether to waive, dissolve, or abandon it, or to add to, change, or modify it, or vary or qualify its terms, and thus make it a new one, which must in such case be proved partly by the written and partly by the subsequent unwritten parol contract which has thus been incorporated into and made part of the original one. *Taylor v. Seaboard etc. R. R. Co.*, 509.
5. CONTRACT TO MAKE COMPENSATION FOR INJURY DONE BY PAST ILLEGAL COHABITATION, which contains no stipulation for future intercourse, is not invalid, even though the intercourse be kept up after the contract has been fully executed, where there is no evidence of any promise or understanding other than that inferred from the fact of future illicit intercourse between the parties. *Smith v. Du Bose*, 290.
6. RIGHTS AND LIABILITIES OF COLORED RACE IN RESPECT TO ILLICIT INTERCOURSE are the same as those of the white race. And whatever rights and privileges belong to a white concubine, or to a bastard white woman and her children, belong also to a colored woman and her children. The same principles of law govern the rights of each race. *Id.*
7. WHITE MAN MAY LAWFULLY MAKE COMPENSATION TO HIS COLORED PARAMOUR for past illegal cohabitation. *Id.*
8. COURT WILL NOT DECLARE TRANSACTION VOID ON GROUNDS OF PUBLIC POLICY, except in cases free from doubt. And what constitutes public policy, and what contravenes it, is a question of law for the court, and not one of fact for the jury. *Id.*
9. RESCISSION OF A CONTRACT ON THE GROUND OF FRAUD MUST BE PROMPTLY MADE, or the right to make it is waived. A defrauded party has but one election to rescind, and must exercise that election with reasonable promptitude after discovering the fraud. When he once elects, he must abide by his decision. *Dennis v. Jones*, 399.
10. ELECTION NOT TO RESCIND A CONTRACT ON THE GROUND OF FRAUD MAY BE INFERRED from payments of purchase-money after notice of the

fraud, or from continuing to deal with the property as if no fraud existed. *Id.*

See DAMAGES, 1; SALES.

CONVERSION.

See TROVER.

CORPORATIONS.

1. WHEN CORPORATION IS FORMED UNDER AUTHORITY OF STATE, CAPITAL SUBSCRIBED BECOMES BASIS OF CREDIT, and the members of the corporation are not individually liable for its debts, except and only to the extent that the charter or letters of incorporation may make them so. *Marshall Foundry Co. v. Killian*, 539.
2. CAPITAL STOCK OF CORPORATION, INCLUDING UNPAID SUBSCRIPTIONS THERETO, CONSTITUTE a trust fund for the benefit of the creditors of the corporation, and the creditors have a right to examine into the action of the corporation to see if the subscriptions have been paid, and how. *Id.*
3. EACH SUBSCRIBER FOR STOCK IN CORPORATION BECOMES LIABLE FOR THE AMOUNT of stock subscribed by him, and he can only discharge this liability by paying it, in money or money's worth, in the manner indicated by the subscription and the charter and by-laws of the corporation. Parol evidence is not admissible to vary the terms of subscription, or to show a discharge from liability in any way other than that required by the terms of subscription and the charter and by-laws. *Id.*
4. PERSONS WHO SUBSCRIBE TO STOCK AND PARTICIPATE IN IRREGULAR FORMATION OF CORPORATION UNDER GUISE of the authority conferred by statute constitute a corporation *de facto*, if not *de jure*; and having held out inducements to the public to deal with and credit it upon the faith of its chartered capital, they are liable at least to the extent of the capital stock subscribed by them, and cannot evade that liability by any secret arrangement entered into among themselves. *Id.*
5. ONE WHO PARTICIPATES IN ORGANIZING SUCH CORPORATION, AND WHO ACTS AS ITS PRESIDENT, WAIVES all objection to the validity of its constitution or organization, and as to him the provisions of its charter and by-laws are binding. *Id.*
6. TRANSFEREE OF STOCK IS NOT LIABLE FOR UNPAID BALANCE OF SUBSCRIPTION PRICE, where he holds as an innocent purchaser for value, without actual notice of the fact that the stock was subject to future calls for such unpaid balance. *West Nashville P. Co. v. Nashville Sav. Bank*, 835.
7. BOOM COMPANIES ARE QUASI PUBLIC CORPORATIONS intended to supply facilities to the general public for the driving of logs. *West Branch B. Co. v. Lumber & L. Co.*, 766.
8. CHARTERS OF MOST PRIVATE CORPORATIONS ARE FOR PURPOSE OF PRIVATE GAIN; but as they are intended also to subserve great public interests, they should be so construed as not to defeat the purpose of their creation. *Id.*
9. GENERAL PRINCIPLE IN CONSTRUCTION OF STATUTES IS, that a proviso, or saving clause, which is directly repugnant to the body of the act, will not have effect to defeat the purpose of the enactment; but this principle will not apply in the construction of the charters of private corporations, where the matters contained in the saving clause are made and intended to be made an essential condition of the enjoyment of the char-

- ter. If private corporations accept charters under such circumstances, they must enjoy their privileges subject to the conditions, or not enjoy them at all. *Id.*
10. **THOUGH CHARTER OF PRIVATE CORPORATION IS TO BE STRICTLY CONSTRUED**, yet when the commonwealth has granted a public franchise, a clause relative merely to the manner in which such franchise shall be exercised will not be construed so as to defeat the grant. *Id.*
 11. **CONSTRUCTION TO BE GIVEN TO PROVISOS TO SMOTIONS 2, 3, AND 7**, act of March 29, 1849 (P. L. 245), incorporating the West Branch Boom Company, must not be such as to defeat the grant itself, forbidding the company to stop a mixed mass of logs for the shortest time reasonably necessary, by the use of the utmost diligence and skill, to withdraw from that mass their own logs. And if, in the exercise of their powers, they detain logs, and are in no way negligent, the special remedy provided by section 3 of the act must be pursued. *Id.*
 12. **MERE INSOLVENCY IS NEVER SUFFICIENT EVIDENCE OF SURRENDER OF CORPORATE RIGHTS.** *Dewey v. St. Albans T. Co.*, 84.

See CHARITIES; STATUTE OF LIMITATIONS, 1.

COSTS.

1. **WHEN PLAINTIFF IS PREVAILING PARTY** in a suit in equity, he should recover costs, but this is in the discretion of the trial court, and will not be disturbed, unless there has been an abuse of the discretion. *Turner v. Johnson*, 62.
2. **WHERE SUBSTANTIAL ISSUES** are found for both parties, the taxation of costs rests in the discretion of the courts, and will not be disturbed, unless there has been a clear abuse of discretion. *Id.*
3. **PLAINTIFF, AND NOT DEFENDANT, MUST PAY COSTS** in a suit to redeem from a mortgagee's possession, and this though he succeeds, unless defendant is guilty of fraud in his defense. *Id.*

CO-TENANCY.

1. **ADVERSE POSSESSION.** — **IF ONE TENANT IN COMMON CONVEYS WHOLE ESTATE IN FEE**, and his grantee enters and claims and holds the exclusive possession, the conveyance and entry and possession must be deemed adverse to the title and possession of the co-tenant, and amount to a disseisin; and such possession, if continued for twenty years, will bar the title of such co-tenant. The conveyance in fee, and entry under it, and possession, are notorious and unequivocal acts of ownership, of such a nature as to give notice to the co-tenant that the entry and possession are hostile and adverse to his title. *Rutter v. Small*, 434.
2. **PAROL PARTITION BETWEEN TENANTS IN COMMON**, followed by possession, is sufficient to sever the possession, but the equitable title only passes which by adverse possession may ripen into a legal title. *Nase v. Smith*, 79.
3. **CO-TENANT IN POSSESSION UNDER PAROL PARTITION** may defend such possession, control the legal title, and compel its transfer to him. *Id.*
4. **WHERE AFTER PAROL PARTITION** one tenant with the consent of his co-tenant disregards such partition and executes a mortgage on the undivided one half of the land, this is a revocation of such partition as between the parties to the mortgage. *Id.*

5. WHERE CO-TENANT'S ATTACHING CREDITORS DISREGARD PAROL PARTITION and prosecute their suit, and buy the land as the undivided one half of such co-tenant, and then recognize a party holding under the other co-tenant as the owner of the other one undivided half of the land, they cannot elect to affirm the parol partition, and thus defeat the title of the party recognized by them as their co-tenant. *Id.*
6. AS BETWEEN TENANTS IN COMMON, STATUTE OF LIMITATIONS does not run when there is no adverse possession. *Id.*
7. EITHER OF TWO TENANTS IN COMMON MAY RELEASE OR COLLECT A CLAIM FOR DAMAGES for trespass upon the estate; such damages are common to both estates, and belong to them jointly. *Hodges v. Heal*, 199.

COUNTERCLAIM.

PLAINTIFF WHO SUES TWO DEFENDANTS CANNOT DENY COUNTERCLAIM on the ground that it did not accrue to both, when he has always treated the deal as with both. *Drew v. Edmunds*, 122.

COVENANTS.

1. DEED TO PLAINTIFF UNDER WHICH HE CLAIMS THAT COVENANT OF WARRANTY CAME TO HIM is admissible in evidence in an action for the breach of such covenant, to show an assignment of the land to him. *Tillotson v. Prichard*, 95.
2. *LEX LOCI REI SITE* GOVERNS IN ACTION FOR BREACH OF COVENANT OF WARRANTY. In an action for breach of covenant of warranty, where the grantor resides in Vermont, the grantee in New Hampshire, and the land is situated in Minnesota, the construction and force of the contract, including the rule as to damages, must be governed by the law of Minnesota. And if the referee fails to find what the law of Minnesota is, the supreme court of Vermont will decline to presume that the law of Minnesota is the same as that of Vermont, but will recommit the case to the court below to determine the damages according to the rule in Minnesota. *Id.*
3. DECLARATION WHICH COUNTS ON COVENANTS OF SEISIN AND RIGHT TO CONVEY MAY BE AMENDED by adding a count upon the covenant of warranty, and such amendment may be made after the evidence has been heard by the referee. *Id.*
4. COVENANT OF WARRANTY RUNS WITH LAND AS INCIDENT TO IT, notwithstanding the grantor had neither title nor possession, if the grantee has had possession; and a grantee holding under mesne conveyances, who is evicted, may maintain an action upon such covenant. *Id.*
5. ACTION FOR BREACH OF COVENANT OF WARRANTY IS TRANSITORY by the Vermont statute; and the courts of that state, when the grantor resides there, have jurisdiction of such action, although the land is in another state. *Id.*
6. DECLARATIONS OF EVICTOR AND OF HIS WORKMEN ON LAND ARE EVIDENCE to show an eviction. *Id.*

CREDITORS' BILLS.

See EQUITY, 9, 10.

CRIMINAL LAW.

1. INDIOTMENT FOLLOWING LANGUAGE OF STATUTE IS GENERALLY SUFFICIENT; and where the statute makes the exclusion of persons from certain

- privileges an offense, the circumstances constituting the offense need not be particularly averred. *People v. King*, 389.
2. **INDICTMENT FOR EXCLUDING COLORED MEN FROM A SKATING RINK IS SUPPORTED BY EVIDENCE OF REFUSAL TO SELL THEM TICKETS, without which they would not be admitted.** *Id.*
 3. **JEOPARDY WITHIN MEANING OF PROVISION OF PENNSYLVANIA CONSTITUTION, article 1, section 10, that "no person shall for the same offense be twice put in jeopardy of life and limb," is the peril in which a defendant is put when he is regularly charged with crime before a tribunal properly organized, and competent to try him. From this jeopardy he is to be relieved, if relieved at all, by the verdict of the jury.** *Commonwealth v. Fitzpatrick*, 757.
 4. **PLEA OF FORMER CONVICTION MUST BE SPECIAL, and for its support it is necessary to show the legal conviction of the defendant, on an indictment free from error, in a court having jurisdiction, and also the identity of the person convicted, and of the offense of which he was convicted. If such a plea is general, vague, and uncertain, is supported only by proof equally uncertain, and the former indictment upon which the defendant was alleged to have been convicted does not appear in the record, it should be overruled.** *Daniels v. State*, 238.
 5. **ALTHOUGH CONFESSION INDUCED BY THREATS IS NOT EVIDENCE, yet if it be attended by extraneous facts which show that it is true, any such facts thus developed, which go to prove the crime of which the defendant was suspected, will be received as testimony; and if such confession be proved true by the discovery to which it leads, it will be admissible; in case of larceny, however, the property must be identified by other evidence as that which was actually stolen.** *Id.*
 6. **EVIDENCE AS TO TEMPERAMENT, DISPOSITION, AND CONDITION OF MIND of the defendant is not admissible on the trial of an indictment for murder, where insanity at the time of the homicide is not set up as a plea.** *Jacobs v. Commonwealth*, 802.
 7. **REQUEST FOR INSTRUCTIONS may, under the North Carolina code, section 415, be disregarded by the judge, where they are not put in writing and signed.** *State v. Horton*, 613.
 8. **IN CAPITAL CASE, COURT HAS NO POWER TO DISCHARGE JURY after the commencement of the trial, without the consent of the prisoner, unless an absolute necessity requires it. Mere inability of the jury to agree within a few hours or days is not such a necessity; nor is the fact that the regular term is approaching an end, for the courts have power to continue the term until the case can be properly ended.** *Commonwealth v. Fitzpatrick*, 757.
 9. **ONE WHO ENTERS OPEN OUTER DOOR OF BUILDING, AND BREAKS OPEN INNER DOORS with intent to steal, may be convicted of burglary.** *Daniels v. State*, 238.
 10. **INCEST MAY BE COMMITTED WITH ONE'S ILLEGITIMATE CHILD. That the victim of the crime was born out of wedlock constitutes no defense under section 302 of the Penal Code of New York.** *People v. Lake*, 344.
 11. **THERE IS NO VARIANCE BETWEEN INDICTMENT AND PROOF, when the crime of incest is charged to have been committed with Georgiana Lake, whose full name is shown to be Georgiana Jeanette Lake.** *Id.*
 12. **EVIDENCE. — IN LARCENY, the intent to steal by the taking is the gravamen of the crime, and the defendant may testify as to the intent with which the act is done, where such intent is material.** *State v. Williams*, 46.

12. *Id.* — WHEN DEFENDANT IS ON TRIAL FOR LARCENY of a cow, he may testify that he purchased a due-bill on the owner of the cow, and having been informed and believing that such owner would let the cow go on such bill, he took her, thinking he had the right to do so, and with no intent to steal. *Id.*
14. ACCESSARIES. — Where, in prosecution for an assault to kill, parties are indicted as accessaries, they cannot be convicted unless there was a common purpose, both in the mind of the principal and themselves, to kill, and the assault was committed in an attempt to accomplish the common purpose, or unless it was made by the principal with the intent to kill, of which such accessaries had knowledge, and committed some act in furtherance of the attempt mentioned. *State v. Hickam*, 54.
15. ASSAULT, FORCE NECESSARY TO REPEL. — Where party assaulted believes, and has good reason to believe, that great bodily harm is about to be done him, and acts in a moment of seeming impending peril, he need not nicely gauge the *quantum* of force necessary to repel the assault; but in such case, when the plea of self-defense is set up, the question is, whether, under all the circumstances, the accused had reason to believe, and did believe, that the force exercised was necessary to protect him from impending danger of great bodily harm. *Id.*
16. ASSAULT TO KILL — ERRONEOUS CHARGE. — Where accused is on trial for an assault to kill, and pleads self-defense, a charge which instructs that if defendant made the assault charged with a pistol he must show that he made it under circumstances which justified it, is erroneous, for the reason that it casts the burden of proof on defendant, requires a higher degree of proof than the law demands, and submits a question of law to the jury as to what facts would justify the assault. *Id.*
17. ASSAULT TO KILL — PROOF TO ESTABLISH. — In trial of an assault with intent to kill, where the plea of self-defense is interposed, the state must establish, not only by a preponderance of evidence, but beyond a reasonable doubt, that the assault was committed with intent to kill, in malice, and under such circumstances as not to be justifiable as self-defense. *Id.*
18. ASSAULT TO KILL — ERRONEOUS INSTRUCTION. — In trial for an assault with intent to kill, where the plea of self-defense is set up, it is error to instruct the jury to find a verdict of guilty unless the accused showed some satisfactory grounds for making the assault, as it leaves them to determine what facts would satisfy the law and constitute a good defense, a question which they are not competent to determine. *Id.*
19. ASSAULT TO KILL — REASONABLE DOUBT. — Where defendant, on trial for assault to kill, pleads self-defense, an instruction that, upon the facts stated, the jury must find defendant guilty unless they have a reasonable doubt of defendant's guilt, and if so, they must give him the benefit of the doubt, but not telling in what way or to what extent, is erroneous. They must be told that if they entertain such doubt, it is their duty to acquit. *Id.*
20. ASSAULT TO KILL — DEFENSE OF RELATIVE. — When the accused finds his mother and sister engaged in a difficulty with others, he has a right to interfere in defense of his mother, and whether any act he does afterwards can be justified on the ground of self-defense depends on the motive prompting the act, and the circumstances under which it was done, and not as to whether he voluntarily entered into the difficulty. *Id.*

21. **MURDER — UNSKILLFUL MEDICAL TREATMENT.** — When wound inflicted is the cause of death, the accused is guilty of murder, though unskillful medical treatment may have aggravated the wound, and the deceased might have recovered if greater care and skill had been employed in treating him. *State v. Landgraf*, 26.
22. **MURDER.** — **PREMEDITATEDLY** IS PROPERLY DEFINED to mean, "thought of beforehand any time, however short." *Id.*
23. **MURDER.** — **DELIBERATELY** IS PROPERLY DEFINED to mean "done in a cool state of the blood, and not done in a heat of passion engendered by a lawful or just provocation," in the absence of such lawful or just provocation. *Id.*
24. **MURDER.** — **JURY IS PROPERLY INSTRUCTED** that, in order to convict of murder in the first degree, they must believe and find from the evidence that defendant not only shot deceased, but shot intending to kill; and in the absence of qualifying facts and circumstances, a person is presumed to have intended the natural, ordinary, and probable result of his acts. If it is found and believed from the evidence that defendant intentionally shot deceased in a vital part with a deadly weapon, from which death ensued, they must find that his intent was to kill, unless the evidence shows the contrary. *Id.*
25. **PRESUMPTION THAT KILLING, SHOWN TO BE UNLAWFUL, IS MURDER,** may be rebutted, or so far weakened by other evidence in connection with the legal presumption of innocence as to create a reasonable, substantial doubt as to the guilt of the accused or the grade of the crime charged, and thus entitle him to an acquittal or to a reduction of the grade. *Tiffany v. Commonwealth*, 775.
26. **MALICE IS ESSENTIAL INGREDIENT OF MURDER,** either of the first or second degree, and while its existence may be presumed from certain proved or admitted facts, the presumption is not necessarily conclusive. There may be rebutting evidence for the consideration of the jury. *Id.*
27. **IN CRIMINAL CASES, BURDEN OF PROOF NEVER SHIFTS, BUT RESTS** on the prosecution throughout, so that in all cases a conviction can be had only after the jury have been convinced, beyond a reasonable doubt, of the defendant's guilt. It results that if from any or from all the evidence taken together a reasonable doubt of guilt is raised, there should be an acquittal. *Id.*
28. **ERRONEOUS CHARGE AND ERRONEOUS REFUSAL TO CHARGE.** — On a trial for murder, where there was evidence of an attack made upon the defendant so violent as to warrant him in believing that he was in danger of great bodily harm or loss of life unless he used a pistol in defending himself, a charge that "if the facts and circumstances are in evidence, no matter by whom produced, which make the extenuation that reduces the grade of the crime, they have the effect to reduce it, but those facts and circumstances must be more than sufficient to raise a reasonable doubt," is misleading and erroneous; and it is error, in such case, to refuse to charge that if the circumstances in evidence raised a reasonable doubt of murder in the second degree, they would operate to acquit of it. *Id.*
29. **SELF-DEFENSE.** — **OWNER OF LAND HAS RIGHT TO ORDER TRESPASSER THEREFROM,** but he has no right to follow him up until an attack is made upon himself so fierce as to compel him to take the life of the trespasser in self-defense. *Id.*

30. WHERE, ON TRIAL FOR MURDER, THERE IS EVIDENCE TENDING TO SHOW that the defendant was assaulted by the deceased and another, and that he killed the deceased in self-defense, evidence to prove the bad reputation of such other person as a violent and dangerous man, and that all this was known to the defendant at the time of the homicide, is admissible, as directly bearing on the question of justifiable self-defense. *Id.*
31. SEDUCTION UNDER PROMISE OF MARRIAGE. — INSTRUCTION that there was no evidence to go to the jury in support of an indictment for seduction under promise of marriage may properly be refused, where there is evidence that a child was born to the prosecutrix, that it resembled the accused, that he admitted the promise of marriage, but said it was only made as a piece of "devilment," and the virtuous character of the prosecutrix is conceded. *State v. Horton*, 613.
32. EVIDENCE. — UPON TRIAL OF ACCUSED FOR SEDUCTION UNDER PROMISE OF MARRIAGE, CHILD MAY BE SHOWN TO THE JURY to enable them to trace resemblance to alleged father, and they may take into consideration its appearance for that purpose. *Id.*
33. INSTRUCTION is not made erroneous by the insertion by the court of the single word "from" between the words "believe" and "the" in a requested charge commencing, "If the jury believe the testimony of," this being the only modification or change made; it is the province of the jury to interpret and say what is proved by the witnesses. *Id.*
34. CONSENT, IF SEDUCTION BE PROVED, IS NO DEFENSE to an indictment under the North Carolina statute (Acts 1885, c. 248) for seduction under promise of marriage. The statute plainly contemplates a seduction brought about by means of a promise of marriage in the nature of a deceit. *Id.*

DAMAGES.

1. ONE WHO SUFFERS FROM A BREACH OF A CONTRACT MUST SO ACT AS TO MAKE HIS DAMAGES as small as he reasonably can. He must not, by inattention, want of care, or inexcusable negligence, permit his damage to grow, and then charge it all to the other party. *Wright v. Metropolis Bank*, 356.
2. EXCESSIVE VERDICT. — IN DETERMINING THE MEASURE OF DAMAGES for injury resulting in death, the primal inquiry is not what is the value of the life taken; it is whether and how much negligence was displayed in taking it, and whether and to what extent the negligence of the deceased caused or contributed to it; and from the reasonable and just compensation to be given upon determining the first inquiry against the negligent wrong-doer what amount should be deducted on account of the contributing fault of the deceased. In adjusting these questions, the value of the life must be in reasonable aspects estimated. The age, condition, capacity of earning money, and expectation of life should all be considered and given due weight. So where the deceased was fifty-seven years old, partially paralyzed, with limited expectation of life, his capacity to labor nearly gone, his earnings reduced to a small sum per month, his death being from apoplexy, and attended with little mental or physical suffering, and a doubt existing whether the injury caused his death, a verdict of twelve thousand dollars damages is excessive. *Louisville etc. R. R. Co. v. Stacker*, 840.

See NUIRANCE; TELEGRAPH.

DEATH.

1. **PRESUMPTION OF DEATH FROM ABSENCE.** — A person who leaves his home for temporary purposes, and is not heard from for the space of seven years by those who would naturally have heard from him, is presumed to be dead; but the death of such person, at any particular time during that period, is never presumed, but must be proved. *Johnson v. Matthews*, 162.
2. **DEATH MAY BE PROVED IN CASE OF A PERSON UNHEARD OF FOR A LONG PERIOD OF TIME** by showing facts from which a reasonable inference would lead to that conclusion; and the time of the death may be fixed with more or less certainty in the same manner. *Id.*
3. **PRESUMPTION AS TO SURVIVORSHIP.** — Where several lives are lost in the same disaster, there is no presumption from age or sex that either survived the other; but the fact of survivorship must be proved by the party asserting it. *Id.*

See **ATTAINDER; DAMAGES**, 2.

DEEDS.

1. **TO THE CREATION OF AN ESTATE OF INHERITANCE, THE WORD "HEIRS" IS NECESSARY**, if it is to be created by a feoffment or grant; but in a will, such estate may pass without the use of the word "heirs." *Melick v. Piddock*, 901.
2. **ALL DEEDS SHOULD BE CONSTRUED FAVORABLY**, and as near the intention of the parties as possible, consistent with the rules of law. *Id.*
3. **TO CREATE A FEE, IT IS NOT ESSENTIAL THAT THE WORD "HEIRS" BE LOCATED IN ANY PARTICULAR PART OF THE GRANT.** *Id.*
4. **EVIDENCE TO SHOW WHO TAKES AS "CHILD" IN TRUST DEED.** — Where a woman of such an age that there is no possibility of her having future issue purchases land, and has it conveyed to a trustee in trust for her sole and separate use for her natural life, and after her death to such child or children as she may leave living at the time of her death, evidence that she had no children of her own, that a daughter of a former husband always lived with her, and was always recognized by her as her child, that there was no other person in being when the deed was made, or afterwards, to fill the description of her child as used therein, and that a part of the money paid for the property was probably derived from said former husband, is sufficient to show that said daughter was the person intended to take in remainder after the death of the *cestui que vie*. This is a case of latent ambiguity rather than of mistake as to the person designated as beneficiary in the deed. *Houston v. Bryan*, 252.
5. **PAROL EVIDENCE IS ADMISSIBLE TO APPLY DESCRIPTION OF PERSON GIVEN IN DEED** so as to ascertain the particular person intended to be embraced in that description, and to explain all latent ambiguities, and the evidence required for that purpose need not be of the same high character and tendency as that which would be required to authorize the correction of a mistake therein. *Id.*
6. **GENERAL RULE IS THAT DEED MUST BE UPHELD** if possible, and the terms and phraseology of description will be interpreted to that end if this can reasonably be done consistently with the principles and rules of law. *Edwards v. Bowden*, 487.
7. **DESCRIPTION IN DEED OF "a tract of land lying in Greene County, North Carolina, adjoining the lands of Patrick Lynch and R. N. Bowden, sita-**

ste on the east side of the road leading from Jerusalem Church to Patrick Lynch's, it being a portion of their part of the original Gray R. Fridger tract, and containing fifty acres," sufficiently points to a particular tract of land, so described as that it may be identified by proper parol evidence. *Id.*

8. ORAL EVIDENCE IS ADMISSIBLE FOR THE PURPOSE OF SHOWING THAT THE CONSIDERATION FOR A DEED OF LAND by contemporaneous verbal agreement also settled a trespass previously committed by the grantee upon the land. *Hodges v. Heal*, 199.

See ACKNOWLEDGMENTS; COVENANTS; EQUITY, 3; HUSBAND AND WIFE, 1; MARRIED WOMEN, 5-7; MORTGAGES.

DOWER.

STATUTE DOES NOT REQUIRE SHERIFF TO ATTEST "WRIT OF DOWER," or the report of the jury assigning it; and if it were otherwise, the attestation of the report by the deputy would not render the proceeding void, but only irregular in that respect. *Brickhouse v. Sutton*, 497.

See WILLS.

DURESS.

See MARRIAGE AND DIVORCE; SALES, 1.

EASEMENTS.

1. SURFACE WATER—OBSTRUCTING FLOW OF.—IF, FOR PURPOSE OF CONSTRUCTING RAILROAD, or for any other purpose, it becomes necessary to erect an embankment, a proper outlet or culvert must be provided of ample capacity to carry off the flow of surface water, so that it may not be obstructed, and thus accumulated on the upper and adjacent lands of other persons. But while such outlet must be of ample capacity to carry off all the water likely to be in it, the rule is not applicable to an extraordinary and excessive rainfall, which is held to be *vis major*. Such infrequent and extraordinary occurrences cannot be foreseen and provided against, and for damages caused by them no one is responsible. *Philadelphia etc. R. R. Co. v. Davis*, 440.
2. RAILROAD COMPANY UNDERTAKING TO ALTER ESTABLISHED OUTLET through which surface water was carried away is bound to have the work done in a careful and skillful manner; and if it be done carelessly and negligently, so that, as a consequence, injury to neighboring property ensues, an action for damages is maintainable. *Id.*
3. SERVITUDE OF SUFFICIENT SURFACE SUPPORT EXISTS IN UNDER OR MINERAL ESTATE in favor of the upper or superincumbent estate, where one person owns the surface and another person owns the underlying coal or other minerals, unless the parties have otherwise covenanted. *Williams v. Hay*, 719.
4. ABSOLUTE RIGHT OF UPPER ESTATE TO SURFACE SUPPORT IN UNDER OR MINERAL ESTATE IS NOT TO BE TAKEN AWAY by mere implication from language in a deed which does not necessarily import such a result; and therefore the right of support is not taken away by a clause in a deed conveying the surface, but reserving the underlying coal and other minerals, which provides that the grantor, "in mining and removing the coals, iron ore, and minerals aforesaid, shall do as little damage to the surface as possible." *Id.*

5. CASE IS PROPER FORM OF ACTION TO RECOVER FOR DAMAGES TO SURFACE OF LAND caused by removing the support thereof by operating the underlying mines; or, at all events, an objection that the action should have been trespass is of no avail after a trial upon the merits, especially where the defendant suffered no injury thereby. *Id.*

EJECTMENT.

- CASE IN EJECTMENT SHOULD NOT BE WITHDRAWN FROM JURY, AND VERDICT FOR PLAINTIFF DIRECTED, even though the defendant's evidence is contradicted, where, in support of the defendant's claim of title by adverse possession, he testified that more than twenty-one years before suit he purchased possession from one who was in possession under a contract of sale, and had ever since held possession as his own, paying no rent, and paying the taxes. *Bennett v. Morrison*, 711.

EQUITY.

1. EQUITY HAS JURISDICTION FOR DISCOVERY AND RELIEF in proper cases touching lost written instruments. *Lancy v. Randlett*, 169.
2. EQUITY WITHHOLDS RELIEF IN CAUSES when the party asking it deliberately makes the mischief from which he suffers. *Id.*
3. IF THE LOSS OF A DEED IS ACCIDENTAL and without fault of the grantee, thereby subjecting his title to hazard and peril from which the law gives him no adequate relief, equity will afford that relief most suited to the necessities of the case. *Id.*
4. BILL FOR DISCOVERY. — A COURT OF EQUITY HAVING ONCE OBTAINED JURISDICTION upon a bill containing the proper averments will retain it after discovery, and grant relief if both discovery and relief be prayed for in the bill, and this although the discovery shows the proper relief to be an award of damages that ought to be ascertained by the jury. *Id.*
5. TO OBTAIN JURISDICTION FOR RELIEF IN EQUITY UPON THE GROUND OF DISCOVERY, THE BILL MUST AVER that the facts sought to be discovered are material to the cause of action, and that the orator has no means of proving them in a court of law, and that the discovery of them by respondent is indispensable as proof, and the want of such averment is fatal on demurrer. *Id.*
6. AVERMENTS OF NECESSITY FOR DISCOVERY ARE NOT ESSENTIAL, AND A DEMURRER CANNOT BE SUSTAINED for the want of them, if the discovery sought be in aid of the averments of the bill, that show the cause to be one of equitable jurisdiction. *Id.*
7. BILL OF DISCOVERY IS INSUFFICIENT for the want of equity, where it fails to show the circumstances of the loss of a missing deed, or that the loss was occasioned without the orator's fault, and a demurrer thereto for such reason will be sustained. *Id.*
8. AMENDMENT TO BILL IN EQUITY FOR DISCOVERY will be allowed on terms. *Id.*
9. CREDITOR'S BILL. — IF CREDITORS HAVE OBTAINED GENERAL JUDGMENTS against their debtor's estate, but cannot take out execution thereon because of his death, and the estate being insolvent, no further proceedings at law are required to lay the foundation for equitable relief in the shape of a creditor's bill as against a fraudulent grantee. *Lyons v. Murray*, 17.
10. CREDITOR'S BILL IS SUFFICIENT, as against a general demurrer stating no specific objections, when the bill, which is brought to subject certain

funds to a judgment at law, alleges that one partner, on the death of the other, administered on the partnership estate, and paid a firm debt out of his individual estate, and on final distribution of the firm's assets, procured an order to pay forty-two per cent of such firm debt out of the partnership property, and paid such amount with intent to defraud his creditors, and thus take credit for a fictitious payment; and the bill need not allege, in terms, that the creditor received the last payment to aid in defrauding creditors, nor that he had notice of such intended fraud, for the reason that it was without consideration, and void as to them. *Id.*

ESTATES.

See DEEDS; TRUSTS.

ESTATES OF DECEDENTS.

See WILLS.

ESTOPPEL.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 3; JUDGMENTS.

EVIDENCE.

1. COMPETENCY OF TESTIMONY IS TO BE DETERMINED BY THE STATUTES IN FORCE at the time it is read in evidence, rather than by the statute existing when the evidence was taken. *Pickens v. Kneisely*, 622.
2. EVIDENCE OF STATEMENTS DISCLOSING ESTATE, made to probate judge under the Revised Statutes of Maine, chapter 64, section 67, is competent against party making them, in action to recover property so disclosed. *Dunbar v. Dunbar*, 166.
3. DECLARATIONS OF PLAINTIFF IN INTEREST AGAINST VALIDITY OF HIS CLAIM, though made before he became the owner of the claim, are admissible and competent evidence to establish a defense in a suit upon such claim, and it is error to limit the declarations to the impeachment of the plaintiff in interest. *Barber v. Bennett*, 141.
4. DECLARATIONS OF PARTY TO SUIT can be offered in evidence to impeach him without laying any foundation therefor. *Owens v. Kansas City R'y Co.*, 39.
5. DECLARATIONS OF PARTY TO SUIT, purporting to be contained in an uncompleted deposition, are not admissible to impeach him, when he denies making such declarations, and the opposing party does not show, or offer to show, that such declarations were made by him. *Id.*
6. EVIDENCE OF CHARACTER OF PARTIES to a cause, or of particular facts not in issue, with a view of raising a presumption in favor of a person, or unfavorable to his adversary, is inadmissible, except where the character of the parties is in issue. *Fahey v. Crotty*, 305.
7. EVIDENCE OF GOOD CHARACTER is usually confined to cases where defendant is charged with having committed a criminal offense. *Id.*
8. EVIDENCE OF GOOD CHARACTER to rebut imputations of misconduct or fraud is inadmissible in civil actions, except where by the pleadings the character of the party is put in issue. *Id.*
9. IN SUIT AGAINST RAILROAD COMPANY for injury caused by negligence of company, and resulting in death, and the question being whether the injury caused the death or it resulted from other causes, it is error to permit witness to testify that deceased told him "he was knocked up and crippled." *Louisville & N. R. R. Co. v. Stacker*, 840.

10. **PERSONAL EXAMINATION OF PLAINTIFF.** — In an action for damages for personal injury, defendant has no absolute right to have a personal examination of plaintiff; that is entirely within the discretion of the court, the exercise of which discretion will not be interfered with unless manifestly abused. *Owens v. Kansas City R'y Co.*, 39.
 11. **HANDWRITING — PRELIMINARY QUESTION FOR THE COURT.** — Specimens of handwriting, not otherwise pertinent to the issue, may, upon being admitted or proved to be genuine, be introduced before the court and jury as a standard for comparison by which to test the genuineness of a writing in controversy; when a writing is offered in proof as a standard, the court should first find as a fact that it is genuine, and the decision of the court as to the credibility of this preliminary evidence is conclusive, unless upon a report of all the evidence it is shown to be without foundation, or based upon some erroneous application of legal principles. *State v. Thompson*, 172.
 12. **STANDARD SPECIMENS OF HANDWRITING PROVED OR ADMITTED TO BE GENUINE MAY BE COMPARED BY EXPERTS** in the presence of the jury, and such experts may express their opinion, founded on such comparison, as to whether the controverted paper be genuine or not. *Id.*
 13. **EXPERT TESTIMONY IS NOT ADMISSIBLE UPON QUESTION** which the court or jury can decide upon the facts. When the relation of facts and their probable results can be determined without special skill or study, the facts themselves must be given in evidence, and the conclusions and inferences must be drawn by the jury. *Stamora v. Shaw*, 412.
 14. **RULE THAT WHERE WHOLE OF CORRESPONDENCE IS CALLED FOR, ALL OF IT MUST BE ADMITTED, HAS NO APPLICATION** to a case where one party attempts to fix a liability for negligence upon another, and offers in evidence against him certain letters written by the former to the latter after the transactions between them have come to an end. The duty of the party accused of negligence being then discharged, and his liability for negligence, if he had been guilty of any, being then fixed, neither his rights nor his liability could be affected by any communication he may have subsequently received from the party seeking to hold him liable. *Id.*
- See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 1-5; BASTARDY; COMMON CARRIERS; COVENANTS; CONTRACTS, 1; DEATH; DEEDS; EJECTMENT; LIBEL; MASTER AND SERVANT; NEGLIGENCE; PAYMENTS.**

EXECUTIONS.

1. **AN EXECUTION GARNISHMENT MUST BE SUPPORTED BY A VALID JUDGMENT.** *White v. Foote L. Co.*, 650.
2. **ISSUE OF EXECUTION UPON JUDGMENT BARRED** by lapse of time would confer no right to sell; and the sale, if made, would be ineffectual to pass title. *Coward v. Chastain*, 533.
3. **LEVY ON LAND IS UNNECESSARY WHEN THE JUDGMENT IS A LIEN THEREON.** And where land is sold under execution, it is only essential that the requirements of the law be observed, and that it be fully made known what property, describing it with sufficient certainty, is exposed to sale, and what the bidder who may purchase acquires. *Farrier v. Houston*, 597.
4. **RENTALS IN SHERIFF'S DEED** as to his acts are *prima facie* evidence of the facts recited. *Id.*

5. **SUFFICIENT DESCRIPTION OF LAND NOT VITIATED BY ERRONEOUS ADDITION.** — Where land is correctly described in a levy by metes and bounds, and by mentioning the adjacent and surrounding landed proprietors, but in giving the number of the district a mistake is made, the sheriff will not be enjoined from executing the process on that ground, the land being capable of ready identification notwithstanding such mistake. *Bogges v. Lowrey*, 279.

See INSURANCE, 4, 5.

EXECUTORS AND ADMINISTRATORS.

1. **PURCHASE BY ADMINISTRATOR AT HIS OWN SALE IS VOIDABLE** at the option of any party interested in the property, whether the sale be made directly to him or through the interposition of another person. *Houston v. Bryon*, 252.
2. **ADMINISTRATOR IS NOT BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE**, so as to entitle him to an allowance for his improvements, where he sells land in which he knows that his intestate had no interest therein upon which he could administer, and becomes the purchaser at his own sale. And, in an action brought against him by the person entitled to such property, for the recovery thereof, he will not be allowed for his improvements, except as a set-off against mesne profits. *Id.*
3. **EXECUTOR IS NOT BOUND TO SET UP STATUTE OF LIMITATIONS AS DEFENSE** to claim against estate of deceased debtor, but may pay the same notwithstanding the statutory presumption of payment, and is entitled to credit therefor in his administration account; particularly so where the testator before his decease had declared that he owed such claim, and had expressed a wish that it should be paid. *Halliburton v. Carson*, 565.
4. **EXECUTOR IS COMPETENT WITNESS TO FACT THAT TESTATOR HAD DECLARED TO HIM**, just before his death, that he owed a certain debt claimed to have been barred by the statute of limitations, and that he wished such debt paid; sections 580 and 590 of the North Carolina code do not make such witness incompetent. *Id.*
5. **CONFLICT OF JURISDICTION.** — **EXECUTOR WHO PAYS IN COIN TESTATOR'S DEBT** on a bond, in accordance with a prior decision of the supreme court of North Carolina, will be protected, although such ruling conflicts with the decisions of the United States supreme court. *Id.*
6. **APPEAL BY PERSON ACTING IN TWO CAPACITIES.** — Where a person is interpleaded both as administrator and as an heir at law, the filing of claim of appeal and the execution of an appeal bond stating an appeal in his individual capacity will not perfect the appeal as to him in his representative capacity, though he subsequently files notice with the proper officer that he appeals in both capacities, and that his appeal bond has been filed. *Love v. Francis*, 290.

EXPERTS.

See EVIDENCE, 11, 12.

FACTORS.

- CONSIGNMENT OF GOODS TO FACTORS FOR SALE, WITHOUT INSTRUCTIONS AS TO PRICE, CONFERS UPON THEM RIGHT TO EXERCISE THEIR JUDGMENT** in the sale, and they were neither bound to write for instructions, nor, having written, to wait for a reply before selling. *Conway v. Leals*, 700.

FALSE IMPRISONMENT.

MARRIED WOMAN — FALSE IMPRISONMENT. — JUDGMENT CREDITOR IS NOT LIABLE in trespass for refusing, on notice that his debtor is a married woman, to release her from arrest already made by an officer on an execution regularly issued on a judgment recovered against her as a single woman before a court having complete jurisdiction. *Winchester v. Everett*, 228.

FIXTURES.

1. Structure erected on the land of another becomes his property, although built with a view of enforcing an adverse right in the land. *Campbell v. Roddy*, 889.
2. AGREEMENT BETWEEN A LAND-OWNER AND ONE AFFIXING CHATTEL TO THE LAND, that such chattels shall retain their character of personality, is efficacious between the parties thereto. In some of the states such agreement is equally effective against prior mortgagees and against subsequent purchasers or encumbrancers having notice thereof. *Id.*
3. MORTGAGOR'S RIGHT TO FIXTURES SUBSEQUENTLY ANNEXED. — If, after the execution of a mortgage, chattels which belong to a third person, or upon which he has a chattel mortgage, are affixed to the land, his interest or lien does not therefrom become subject to the prior mortgage. The chattels may be detached notwithstanding the objection of the prior mortgagor, unless such detachment will so injure the freehold as to make it substantially less valuable than it would have been had the chattels never been attached thereto. *Id.*
4. AS BETWEEN LANDLORD AND TENANT, PROPERTY OF LATTER, IN FIXTURES of any description which he has annexed to the demised premises during his term, consists simply in the right or privilege of removing them; and if this is not exercised in due time, they become the property of the landlord. *Carlin v. Ritter*, 467.
5. BY TERM "FIXTURE," IN ITS LEGAL SENSE, IS MEANT something so attached to the realty as to become, for the time being, a part of the freehold, as contradistinguished from a mere chattel. *Id.*
6. TENANT'S RIGHT TO REMOVE FIXTURES CONTINUES during his original term, and during such further period of possession by him as he holds the premises under a right to still consider himself as a tenant. But where a tenant quits possession, or surrenders the premises unqualifiedly to his landlord without removing or reserving his fixtures, he is understood to make a dereliction of them to his landlord. *Id.*
7. RIGHT OF TENANT FROM YEAR TO YEAR TO REMOVE FIXTURES placed by him on the demised premises is lost, where, subsequently and during the tenancy, he receives notice to quit at the end of the current year, and does not so do, but obtains and accepts from his landlord a written lease of the premises, "together with all the rights, appurtenances, and privileges thereunto belonging or in any wise appertaining," for a term of five years, but containing no reservation of the right to remove the fixtures then on the premises. *Id.*
8. WOODEN STRUCTURE OR BUILDING MERELY RESTING BY ITS OWN WEIGHT on flat stones laid upon the surface of the ground, and having no other foundation, is not a fixture. *Id.*

FORFEITURES.

See ATTAINDER.

FRAUD.

See CONTRACTS, 9, 10; FRAUDULENT CONVEYANCES; SALES, 3-5.

FRAUDULENT CONVEYANCES.

1. FRAUD MAY BE INFERRED FROM FACTS CALCULATED TO ESTABLISH IT; and should be so inferred when the facts and circumstances lead a reasonable man to the conclusion that an attempt has been made to withdraw the property of the debtor from the reach of his creditors, with the intent to prevent them from recovering their just debts. *Burt v. Timmons*, 665.
2. FRAUD. — TRANSACTIONS BETWEEN HUSBAND AND WIFE, father and child, brother and sister, and other relatives, may be shown to be fraudulent as against creditors by less proof, and the party claiming the benefit of such transactions is held to fuller and stricter proof of their justice and fairness, after they have been shown to be *prima facie* fraudulent, than would be required if the transaction was between strangers. *Id.*
3. FRAUD — BURDEN OF PROOF. — WIFE PURCHASING PROPERTY FROM HER HUSBAND must assume the burden of distinctly proving that she paid therefor out of funds not furnished by him, if the transfer is assailed by his creditors. *Id.*
4. PRESUMPTION WHEN PROPERTY IS CONVEYED TO WIFE IS THAT THE MEANS OF PAYING THEREFOR were furnished by her husband. *Id.*
5. IMPROVEMENTS PUT UPON REAL PROPERTY OF WIFE, IN FRAUD OF CREDITORS OF HUSBAND, can be followed by them on the premises where they are put; and such realty in favor of such creditors can be charged with the value of such improvements. *Id.*
6. WHERE HUSBAND'S CREDITORS SUCCESSFULLY ASSAIL AS FRAUDULENT A TRANSFER OF REAL PROPERTY MADE BY HIM TO HIS WIFE, and the amount of their debts is so small that they can be paid out of the rents in a short time, the court may, in its discretion, order the land to be rented out, and the rents turned over to them until their debts are paid; but if the debts are so large that it will require some years to pay them out of the rents, the property will be ordered sold, the creditors paid out of the proceeds, and the residue turned over to the wife. *Id.*

See PARENT AND CHILD, 6-10; PARTNERSHIP, 1-4.

GARNISHMENT.

See ATTACHMENT.

GIFTS.

1. TO CONSTITUTE A GIFT CAUSA MORTIS, it is not only essential that delivery be complete, but possession must also be retained by the donee until the donor's death. If after delivery the donor again has possession, the gift is nugatory. *Dunbar v. Dunbar*, 166.
2. GIFT INTER VIVOS is consummated by delivery of the thing given, either actual or constructive; but it is not necessary that delivery be made to the donee in person. It may be made to some person for him, or to a trustee for that purpose, but in such cases the disposition in favor of the donee must be such as will place the *jus disponendi* beyond the power of the donor to recall. *Love v. Francis*, 290.
3. GIFT FROM FATHER TO CHILD. — Less positive and unequivocal proof is required to establish the delivery of a gift from father to child than as AM. ST. REP., VOL. VI. — 60

between persons not related; and in cases where there is no suggestion of fraud or undue influence, very slight evidence will suffice. *Id.*

4. **GIFT INTER VIVOS, WHAT CONSTITUTES.** — Where a father, wishing to reserve to himself the income arising from his land during his life, and give the avails thereof to his heirs, deeds the land to his son and takes the latter's note, secured by mortgage, as payment, payable four years after the father's death, to his legal heirs, the interest during his life payable to him, he thereby creates a gift *inter vivos*, completed as to delivery, as far as consistent with his own rights in the paper, by making the heirs the payees of the note, and by recording the mortgage; and though he retained actual possession of the note for his security as to the interest, still he constituted himself trustee for the heirs in the custody of the note by implication of law, and they alone could enforce payment. Such gift is completed as to acceptance, as to the grantee, by his assigning his interest therein before his father's death, at the happening of which event the proceeds of the note go to the heirs, and not to the administrator. *Id.*
5. **ACCEPTANCE OF GIFT NEED NOT BE MADE IMMEDIATELY;** it is sufficient if accepted before revoked by death or otherwise. *Id.*
6. **PAST ILLEGAL COHABITATION DOES NOT RENDER VOID OR ILLEGAL GIFT** by a man to the woman with whom he has held such relation. *Smith v. Du Bose*, 260.

GROWING TREES.

1. **STATUTE OF FRAUDS.** — TREES GROWING ON LAND SO FAR PARTAKE OF REALTY that any contract for their sale is within the statute of frauds; yet if the contract is in contemplation of their severance from the land, whereby they become personalty, the same rule in respect to the identification of personal property is applicable. *Carpenter v. Medford*, 535.
2. **SALE OF GROWING TREES — PAROL EVIDENCE.** — Where, by a contract of sale in writing, duly proved and registered, the vendor sold "nine walnut trees on my premises, on the waters of Pigeon River, Haywood County (township No. 4), North Carolina," the trees at the time being selected, measured, priced, and marked, but not identified in the contract, parol evidence is admissible to identify them, and if identified, the title would pass under the contract. *Id.*

HABEAS CORPUS.

1. **THE COURT** is not precluded by the return on *habeas corpus*, in West Virginia, from inquiring into the truth of all matters therein alleged. *State v. Reaff*, 676.
2. **RETURN TO WRIT OF HABEAS CORPUS SHOULD SO STATE** the facts necessary to warrant the detention as to apprise the opposite party of what is intended to be proved, and these facts ought not to appear by way of recitals only. *Id.*
3. **LEAVE SHOULD BE GRANTED TO AMEND A RETURN TO A WRIT OF HABEAS CORPUS**, where it appears that further inquiry ought to be made respecting an important fact not distinctly alleged in the return, which fact, if ascertained to exist, would show that petitioner is not a proper person to have the control of the child, whose custody he seeks to obtain. *Id.*

See PARENT AND CHILD, 5.

HIGHWAYS.

1. **TO MAKE ROAD SAFE, TRACK MUST BE WIDE ENOUGH** to allow for the possible shying and starting of teams, without danger to those traveling with them of being thrown over embankments or against obstacles in and along the road; and if the track is not wide enough for this purpose, and a horse, in starting or running away, without fault of the driver, is brought in contact with a defect within what should be the reasonable limits of the road, and damage ensues, the managers of the road will be liable. *Baltimore etc. T. Co. v. Bateman*, 449.
2. **ERRONEOUS INSTRUCTION TO JURY.** — **IN ACTION TO RECOVER FOR INJURY CLAIMED** to have been caused by the defective and insecure condition of the defendant's turnpike road, an instruction to the jury that if they should find "that the defendant negligently permitted a part of its road, one of its bridges, and the approach thereto, to be in an unsafe condition for persons using the same with ordinary care and caution, and that in consequence of such unsafe condition, the plaintiff, while traveling over said road and approaching said bridge with ordinary care and caution, was injured as complained of, then the plaintiff is entitled to recover," etc., is erroneous, since the defective condition and want of repair of the bridge had no casual connection with the injury sustained by the plaintiff before reaching the bridge. *Id.*
3. **IN SUCH ACTION, INSTRUCTION TO JURY THAT PLAINTIFF COULD NOT RECOVER** unless they should find that the defect in the road was of such a nature that a criminal indictment would lie against the defendant for such defect, is properly rejected, if for no other reason that it required the jury to determine, as matter of law, when and for what defect an indictment would lie. *Id.*
4. **OWNERS OF LANDS BOUNDED ON PRIVATE ALLEY, WHO HAVE FREE USE THEREOF, HAVE SAME RIGHTS THEREIN** that the public has in its highways; and if the alley is vacated, the soil belongs to them as tenants in common. *Lewis v. American Academy of Music*, 739.

See **WATERS.**

HOMESTEADS.

1. **JUDGMENT LIEN NOT DISPLACED BY HOMESTEAD ENTRY.** — When judgment lien has attached to land, it cannot be defeated or displaced by subsequent occupation as a homestead. *Bunn v. Lindsay*, 48.
2. **HOMESTEAD — EFFECT OF SHERIFF'S SALE MADE WITHOUT FIRST SETTING OFF.** — Where judgment debtor is entitled to a homestead exempt from sale under execution, and the sheriff fails to set it off at such sale, the latter is not for such reason void, but the fee passes to the purchaser, subject to the homestead right, which is not affected by the sale. *Id.*

HOMICIDE.

See **CRIMINAL LAW**, 15-30.

HUSBAND AND WIFE.

1. **IT IS A SUFFICIENT JOINDER OF A HUSBAND IN HIS WIFE'S DEED** of her property derived from him, for him to express his assent under his own hand and seal, without being in any other manner a formal party thereto. *Bray v. Clapp*, 197.

2. **PROPERTY PAID FOR BY WIFE'S EARNINGS, WHEN NOT LIABLE FOR HUSBAND'S DEBTS.** — If a husband consent that his wife may take boarders into the family, and agree that she shall have the gross proceeds for application on a contract made by him with a third person for the purchase of real estate, and if the money so acquired by her be thus applied, the money is hers, and not his, her right to it being founded on a meritorious consideration; and if, on completing the payment, she take a conveyance of such real estate to herself, her title will prevail against a creditor of her husband who gave credit after the property was paid for, although the conveyance be of later date than the giving of such credit, it not appearing that the credit was given upon the faith of the specific property, or that the debtor was in possession as apparent owner when the debt was created. *McNaught v. Anderson*, 278.

See FRAUDULENT CONVEYANCES; MARRIED WOMEN; WITNESSES, 2-5.

INCEST.

See CRIMINAL LAW, 10, 11.

INJUNCTIONS.

1. **INJUNCTION WILL BE GRANTED TO PREVENT DEFENDANT FROM CLOSING UP A ROAD BETWEEN HIS LAND AND PLAINTIFF'S**, and opening another road on plaintiff's land adjacent to that so closed up, although the damage sustained or apprehended could be satisfied by a pecuniary award. *De Witt v. Van Schoyk*, 343.
2. **ILLEGAL ACT WHICH, IF COMPLETED, WILL CLOUD PLAINTIFF'S TITLE and diminish its value will be enjoined.** *Id.*
3. **INJUNCTION.** — WHERE PARTY HAS OBTAINED TEMPORARY RESTRAINING ORDER, AND DOES NOT APPEAR and ask for its continuance at the time and place fixed by consent for the hearing, it is not error for the judge to vacate it, — no cause being shown for continuing it in force. *Osward v. Chastain*, 533.

See JUDGMENTS, 8-10; MUNICIPAL CORPORATIONS, 9.

INNS.

1. **PROPRIETOR OF SALOON OR TAVERN, OPEN FOR ENTERTAINMENT OF PUBLIC, IS BOUND TO SEE THAT ONE WHO ENTERS IS PROTECTED**, not only from the assaults or insults of those in his employ, but of the drunken and vicious men whom he may choose to harbor. *Rommel v. Schmezbacher*, 732.
2. **PROPRIETOR OF SALOON IS LIABLE FOR INJURIES SUSTAINED BY ONE WHO ENTERS THEREIN and becomes intoxicated, by reason of another, who also became intoxicated there, and who, in full view of the proprietor, attached a piece of paper to the former and set it on fire.** *Id.*

INSANITY.

1. **RETURN TO AN INQUISITION IN THE NATURE OF A WRIT DE LUNATICO INQUIRENDO SHOULD SHOW** whether the individual is so bereft of reason as to warrant his being deprived of power over both his person and his estate. A return that he is an idiot, lunatic, or *non compos mentis*, or of unsound mind, is sufficient, for each of those terms imports such a deprivation of sense as renders the sufferer unfit for self-control as well as for

the management of his affairs. Neither of these words is absolutely essential. Their place may be supplied by words of equivalent import. *In re Lindsay*, 913.

2. UNLESS AN ALLEGED LUNATIC IS SHOWN TO BE UNFIT FOR THE GOVERNMENT OF HIMSELF by the return to the writ *de lunatico inquirendo*, the court will not place him and his estate under guardianship. *Id.*

INSOLVENCY.

1. DISCHARGE UNDER STATE INSOLVENT LAW IS NO BAR TO RECOVERY ON NOTE owned by one who, when the discharge was granted, was a citizen of another state, and in no way became a party to the insolvency proceedings, although the note was executed in the former state, and both parties thereto were, at the date of its execution, citizens of that state. *Roberts v. Atherton*, 133.
2. PLEA IN BAR — DISCHARGE IN INSOLVENCY. — One surety on a note, given before the insolvent law went into effect, and who has paid it and recovered judgment for contribution against his co-surety after the insolvent law took effect, can maintain an action on the judgment, notwithstanding the judgment debtor was subsequently discharged. *Danforth v. Robinson*, 224.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; CORPORATIONS, 12.

INSURANCE.

1. FIRE INSURANCE. — A POLICY UPON PERSONAL PROPERTY IN A CERTAIN PLACE, the separate articles of which are not specifically described, does not attach to and follow portions of such property when removed to another place for repairs without the company's knowledge or consent, and destroyed while there. *Bradbury v. Fire Ins. Co.*, 219.
2. FIRE INSURANCE — WAIVER OF CONDITION AS TO ARBITRATION TO FIX AMOUNT OF LOSS IN POLICY. — Where the policy provides that in case of loss the matter shall be left to arbitration at the written request of either party, and also provides that no action can be sustained for loss until an award shall have been made, in case of a difference between the parties as to the amount of loss, the above provisions must be read together in construing the policy; and as arbitration can only be had at the written request of one of the parties, and becomes imperative only after such request, which is optional with either party, if neither of them avails himself of such right to arbitrate within five months of the time of loss, it is deemed as waived by both, and an action to recover the loss may be sustained. *Nurney v. Firemen's F. I. Co.*, 338.
3. FIRE INSURANCE — AGREEMENT IN POLICY TO ARBITRATE LOSS which is revocable by either party is revoked by bringing an action to recover the loss, but such revocation will not invalidate the policy in the absence of express condition of forfeiture in case of a breach of the agreement. *Id.*
4. BEFORE FORFEITURE CAN OCCUR there must be no question but the parties intended to provide for it in the contract under which it is attempted to enforce it, and when the contract is revocable at the pleasure of either party, without condition expressed, a penalty of forfeiture cannot be enforced against either making the revocation. *Id.*
5. ASSURED WAS NOT BOUND TO REPORT TO COMPANY FACT THAT PERSONAL PROPERTY INSURED WAS UNDER LEVY OF EXECUTION at the time the

application was made and the insurance effected, under a policy which contained a warranty that "the assured, by the acceptance of this policy, hereby warrants that any application, survey, plan, statement, or description connected with procuring this insurance, or contained in or referred to in this policy, is true, and shall be a part of this policy; that the assured has not overvalued the property herein described, nor omitted to state to this company information material to the risk," where there was no fraud on the part of the assured, the sheriff never took the goods out of his possession, the policy contained no clause that the insurance should cease if the property should be levied upon or taken in execution, and there was nothing in the policy to warn the assured that the company regarded a levy as an increase of the risk. *Niagara F. I. Co. v. Miller*, 723.

8. COURT MAY PROPERLY INSTRUCT JURY THAT INSURANCE COMPANY COULD WAIVE RIGHT TO AVOID POLICY on the ground of an erroneous statement by the assured of the amount of judgments against him, and may submit the fact of waiver to the jury, where the policy contained a warranty against untrue statements, but not a distinct warranty against encumbrances, and where, after the loss, the company, with full knowledge of the encumbrances, called for proofs of loss, required the assured to furnish full plans and specifications of the building destroyed, joined in the appointment of appraisers, and for nearly a year did not inform the assured of the objections to payment, but led him to believe that more formal proofs of loss and specifications were desired. *Id.*
7. MORTGAGE PAID, BUT NOT DISCHARGED, IS NOT ENCUMBRANCE, within the meaning of an insurance contract. *Smith v. Niagara F. I. Co.*, 144.
8. FAILURE OF INSURED TO STATE THAT HE BELIEVED PROPERTY WAS MORTGAGED is an omission to state information material to the risk, although the mortgagee had, without the knowledge of the insured, previously voluntarily destroyed the note secured by the mortgage, the insured having, at the time of the contract of insurance, warranted that he had not omitted to state to the company any information material to the risk. At least, such failure is evidence from which that fact might be found, and if it was a question of law, the court should direct a verdict for the defendant, or if it was a question of fact, it should be submitted to the jury with proper instructions. *Id.*
9. GENERAL AGENT OF INSURANCE COMPANY HAS POWER TO WAIVE STATEMENT OF LOSS, notwithstanding such statement is by the terms of the policy a condition precedent to recovery, unless his power is restricted, and the restriction was known to the insured. *Id.*
10. POWER TO WAIVE STATEMENT OF LOSS IS NOT POSSESSED BY LOCAL AGENT of an insurance company, who has never been held out by it as possessing any other authority than to receive proposals for insurance, fix rates of premiums, and issue policies, and who has never acted in the settlement of losses. *Id.*
11. GENERAL AGENT OF INSURANCE COMPANY CAN WAIVE PROOF OF LOSS ONLY IN MANNER PROVIDED in the contract; he cannot waive such proof orally when the contract requires the waiver to be indorsed on the policy. *Id.*
12. TERMS OF ACCIDENT INSURANCE POLICY SHOULD BE LIBERALLY INTERPRETED in favor of assured. *McGlinchey v. Fidelity & C. Co.*, 190.
13. ACCIDENT INSURANCE — CONSTRUCTION OF TERMS OF POLICY. — Where the terms of an accident policy require proof that death was caused "by bodily injuries effected through external, violent, and accidental means,"

recovery may be had, although death was produced by a ruptured blood vessel about the heart, caused either by fright or resulting from extraordinary mental or physical exertion put forth by the deceased to save himself from injury when in imminent peril brought about by accident. *Id.*

14. *Id.* — Where policy declares that insurance "does not extend to any bodily injury of which there shall be no external and visible sign upon the body of the insured," and also that it shall not cover "any death caused" in certain ways named, the former clause is only applicable to injuries not resulting in death. *Id.*

JUDGMENTS.

1. A VOID JUDGMENT CANNOT BE REGARDED AS HAVING ANY LEGAL EXISTENCE in any court, for any purpose. *White v. Foots L. Co.*, 650.
2. JUDGMENT RENDERED IN ACTION AGAINST PARTY THEN DEAD, FACT OF DEATH BEING UNKNOWN to the court or the other parties, is not void, but is irregular and voidable, and may be set aside upon a proper application, by motion, in the action, made within a reasonable time. The application may be made by any person having right under or derived from the deceased party, after the action began. *Knott v. Taylor*, 547.
3. ORDINARILY, ONLY PARTY AGAINST WHOM IRREGULAR JUDGMENT IS RENDERED can complain of it; and if he does not, the presumption is that he is satisfied with it. It is otherwise, however, where he was dead when the judgment was rendered. *Id.*
4. JUDGMENT CANNOT BE ATTACKED COLLATERALLY, or by an independent action, for mere irregularity. The remedy is by motion in the action in which the irregularity complained of appears. *Id.*
5. JUDGMENTS, VACATION OF. — POWER CONFERRED UPON JUDGE BY STATUTE (N. C. Code, sec. 274) to vacate and set aside a judgment and relieve a party therefrom, when taken against him through his mistake, inadvertence, surprise, or excusable neglect, does not extend to a judgment which necessarily follows the verdict. In the latter case, relief is obtainable on motion for a new trial made at the term when the judgment was rendered; but it is discretionary with the judge even then to allow or refuse the relief, and his action in refusing it, except for a supposed want of power, is not reviewable on appeal. *Clemmons v. Field*, 529.
6. COURT CANNOT AT A SUBSEQUENT TERM AMEND, MODIFY, OR SET ASIDE A REGULAR JUDGMENT, except upon an application to rehear, or because of accident, mistake, or inadvertence of the court, surprise, or excusable neglect, as provided by statute. *Cook v. Moore*, 587.
7. ENTRY WILL BE STRUCK FROM THE RECORDS, AND ERROR CORRECTED, where by inadvertence an order of affirmance is entered instead of an order of reversal. *Id.*
8. INJUNCTION IS NOT PROPER REMEDY OF PARTY TO JUDGMENT AGAINST the enforcement thereof, but the redress is by a direct interposition in the cause, recalling or modifying the process, and meanwhile issuing a *superseas* to the officer in possession of it. *Coward v. Chastain*, 533.
9. JUDGMENTS, RESTRAINING ENFORCEMENT OF. — COURT SITTING AS COURT OF EQUITY HAS NO POWER to interfere with the records of the common pleas, and strike therefrom a judgment entered by that court; but if a proper case is presented, it may enjoin the plaintiff from proceeding to enforce the judgment. *Giver's Appeal*, 795.

10. **BILL IN EQUITY WILL LIE TO RESTRAIN ENFORCEMENT OF JUDGMENT ENTERED** upon a bond given in settlement of the criminal charge of forgery, if the defendant has had no day in court, and has not been guilty of laches in setting up the defense when he had an opportunity to do so. But where the complainant, pending an appeal from a decree erroneously dismissing such bill, obtains a rule to show cause, and an order opening the judgment, and admitting him to a defense, and these latter proceedings appear of record, the dismissal of the bill will be affirmed. *Id.*
11. **QUESTION OF JURISDICTION MUST BE TRIED** by the whole record in Missouri, and when it appears therefrom that the court had no jurisdiction over the person or subject-matter, the judgment is void, and will be so treated in a collateral proceeding. *Adams v. Cowles*, 74.
12. **NOTICE BY PUBLICATION.** — **JUDGMENT RECITAL** as to the terms of an order of publication on non-resident defendants, if contradicted by the order itself, must yield, and the order must control. *Id.*
13. **WHERE JUDGMENT OF COURT OF GENERAL JURISDICTION RECITES** due service of notice on non-resident defendants, and there is nothing in the order of publication or the record which specifically contradicts such recital, it will be presumed, upon collateral attack, that the court has acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared; and if the statute required an affidavit of non-residence to be filed prior to the order of publication, it will be presumed, in the absence of proof to the contrary, that such affidavit was filed. *Id.*
14. **RECITAL IN RECORD BY COURT THAT DEFENDANTS IN PROCEEDING NAMED HAD BEEN SERVED WITH PROCESS** is evidence that they had been so served, and that the court had jurisdiction of their persons. Such record cannot be attacked collaterally for irregularity or for fraud. If assailed for irregularity, a motion in the proceeding would be the proper remedy; if for fraud, and the proceeding be ended, the remedy is by an independent action. *Brickhouse v. Sutton*, 497.
15. **VOID JUDGMENT.** — **IT IS ONLY WHEN COURT OF GENERAL JURISDICTION** undertakes to grant a judgment in an action or proceeding where it has not jurisdiction of the parties or the subject-matter of the action, and this appears from the record, by its terms or necessary implication, or by the absence of something essential, that the judgment will be absolutely void, and may, therefore, be disregarded and treated as a nullity everywhere. In such case, the action of the court would be *coram non judice*. *Id.*
16. **COURT CAN PROTECT DEFENDANT LIABLE TO TWO ACTIONS** — one by his grantee for a breach of the covenant of seisin, and another by an assignee of his grantee upon that of warranty — by attaching conditions to the judgment, or by staying execution. *Tillotson v. Prichard*, 95.
17. **RECORDED JUDGMENT CONCERNING LAND IS NOTICE** to subsequent purchasers, in the absence of fraud and misrepresentation; and equity will not relieve against negligence in failing to examine the record, by interfering with the legal rights of others who are without fault. *Burns v. Lindsay*, 48.
18. **EVIDENCE IS COMPETENT TO SHOW THAT DEBT REPRESENTED BY PLAINTIFF'S JUDGMENT WAS PRIOR IN POINT OF TIME** to an unrecorded conveyance of the legal title as collateral security, held by the terre-tenant, against whom it is sought to revive the judgment in a proceeding by *scire facias*. *Kinports v. Boynton*, 706.

19. DOCTRINE OF ESTOPPEL BY JUDGMENT DOES NOT APPLY TO CASE THAT IS AMBULATORY in its nature, and has ceased to be the same by progression. Where, therefore, on the petition of the receiver of an insolvent corporation whose charter provided that a preference should be given to the debts of minors, insane persons, and married women, in case of its dissolution by act of law or otherwise, it has been decreed that all the assets of the corporation shall be equally distributed among all the creditors, on the ground that no dissolution of the corporation was shown, such decree will not preclude all future inquiry into the matter; but in determining whether a dissolution is now shown, the inquiry must be confined to what has transpired in the time between the two proceedings. Relief cannot be granted on what existed before the first decree; and it is not sufficient to show a present state of things adequate to relief. *Dewey v. St. Albans T. Co.*, 84.
 20. PRIOR VERDICT AND JUDGMENT IN ANOTHER ACTION FOR INJURIES TO PROPERTY CANNOT BE SET UP AS BAR when the pleadings disclose the fact that the two causes of action are for injuries to different portions of the property. *Williams v. Hay*, 719.
 21. ESTOPPEL. — WHATEVER IS ADJUDICATED BETWEEN DEFENDANTS has the same effect between them as *res judicata* as if they appeared in the action as plaintiff and defendant. *Parkhurst v. Berdell*, 384.
 22. AN APPEAL FROM A JUDGMENT DOES NOT SUSPEND ITS OPERATION as an estoppel. *Id.*
 23. REVERSAL OF JUDGMENT AFTER IT HAS BEEN RECEIVED AS EVIDENCE IN ANOTHER ACTION cannot operate retrospectively so as to render its reception erroneous. The fact of reversal cannot appear by the record in the second action; and the only remedy of the injured party, if any he have, is by motion for a new trial. *Id.*
 24. JUDGMENT WILL NOT BE REVERSED FOR THE RECEPTION OF IMPROPER EVIDENCE if the same result must have been reached had such evidence been excluded. *Id.*
 25. FORMER ADJUDICATION IN SAME CASE MAY BE AVAILED OF BY SETTING IT UP IN ANSWER, without putting the record thereof in evidence, where the petition expressly makes all prior proceedings in the case a part of itself, but omits to set them out, to avoid prolixity. *Dewey v. St. Albans Trust Co.*, 84.
 26. DECREE IS BINDING UPON WHOLE CLASS OF SUITORS, where the rights of the whole class were, at the hearing, fairly represented and fully and honestly maintained and tried. *Id.*
 27. JUDGMENT OF ANOTHER STATE AGAINST PRINCIPAL AND SURETY, properly assigned to the surety, bears interest in his favor as called for by such judgment. *Turner v. Johnson*, 62.
- See HOVESTRADS, 1; MARRIED WOMEN, 2-4; MORTGAGES; VENDOR AND VENDEE, 7, 9, 10.

JURISDICTION.

1. JURISDICTION OVER CITIZENS OF ANOTHER STATE. — When an alien or non-resident is personally present in any place in the state, however temporarily or transiently in such place, whether abiding, visiting, or traveling at the time, a process duly served upon him personally will confer complete jurisdiction over his person; and this rule may apply in Maine to a municipal court, although it be of limited jurisdiction. *Alley v. Caspari*, 178.

2. NORTH CAROLINA STATUTE (Acts 1870-71, c. 106, sec. 1) which cures irregularities as to the jurisdiction of the courts in respect to special proceedings begun before its enactment is valid. *Brickhouse v. Sutton*, 497.
3. MISSOURI CIRCUIT COURT IN ONE OF GENERAL JURISDICTION, proceeding according to the course of the common law, and nothing will be intended to be out of its jurisdiction but what specially appears to be so. *Adams v. Cowles*, 74.

See COVENANTS, 5; EQUITY; EXECUTORS AND ADMINISTRATORS, 5; JUDGMENTS.

JURY AND JURORS.

FACTS IN PARTICULAR CASE NOT CONSTITUTING SUFFICIENT GROUND of challenge to juror, within the provision of the North Carolina code, section 1733, that "it shall be a disqualification and ground of challenge to any tales-juror that such juror has acted in the same court as grand, petit, or tales juror within two years next preceding such term of the court." *Newby v. Harrell*, 503.

See ATTORNEYS AT LAW, 1; LIBEL; NEGLIGENCE; SLANDER.

LANDLORD AND TENANT.

1. INDEPENDENTLY OF ANY AGREEMENT, LAW IMPOSES upon every tenant, whether for life or for years, the obligation to treat the premises in such a manner that no substantial injury shall be done to them, so that they may revert to the lessor at the end of the term unimpaired by any willful or negligent conduct on his part. *Curtis v. Ritter*, 467.
2. TENANT CANNOT BE HEARD TO DENY TITLE OF HIS LANDLORD, nor can he rid himself of such relation, without a complete surrender of the possession of the land. To allow him to agree and profess to hold possession under one as landlord, and at the same time to hold covertly for himself, or for another's advantage, would be to encourage and uphold a gross fraud, which the law will never do. *Springs v. Schenck*, 552.
3. WHEN TENANT, SUED FOR POSSESSION, DENIES THAT HE WAS TENANT, HE THUS PUTS HIMSELF broadly in hostility to the right of the landlord, and the latter need not prove that the term has ended, or that he made a demand for possession. *Id.*
4. ADVERSE CLAIMANT OF LAND WHO GETS POSSESSION BY COLLUSIVE CONSENT with the tenant of another at once becomes identified with the tenant, shares and stands in his place, and cannot resist the landlord's title where the tenant cannot do so; and he may be evicted, just as the faithless tenant may be. *Id.*
5. WHERE ONE ENTERS UPON LAND BY SUFFERANCE, PERMISSION, OR CONSENT OF TENANT OF ANOTHER, he will himself at once be charged by the law with the allegiance which the tenant owes the lessor, and will not be allowed to act and assume relations in hostility to the title under which he went into possession. *Id.*
6. FACT THAT ONE WAS IN JOINT POSSESSION OF LAND WITH PLAINTIFF'S TENANT at the time action was brought, and that he had title to one half of the land, will not prevent the recovery of a judgment by the plaintiff against his tenant. But the plaintiff would have no warrant, under a writ of possession issued on such judgment, to turn out of possession the real owner of the title. *Id.*

See FIXTURES, 4-8; RAILROADS, 1-3.

LIBEL.

1. **OFFICE OF INNUENDO** is to aver the meaning of the language published, and if the meaning of the language is plain, no innuendo is needed, as the use of it can never change the import of the words, nor add to nor enlarge their sense. *Bourrescau v. Detroit M. J. Co.*, 320.
2. **INNUENDO.** — **WHEN PUBLICATION CONTAINS A DISTINCT** and plain charge, in substance, of official oppression and unwarranted abuse of poor men by officers of the law; of special instances of such abuse by other officers; of a special instance of abuse by plaintiff; and then the general allegation as to mistreatment of "ragged and poor men" by "these fellows," which term "fellows" necessarily and manifestly includes plaintiff, and conveys such meaning to the average reader, — the meaning is sufficiently plain without the aid of any innuendo. *Id.*
3. **INNUENDO.** — **OFFICE OF PLEADING** is to make clear and certain the matters set forth and complained of; and when a publication claimed to be libelous has a clear and certain meaning upon its face, there can be no better pleading than to set out the article in terms and in full when all of it is pertinent to the issue; and the addition of an innuendo, when none is necessary, can add nothing to a clear perception of its meaning, but tends rather to cumber and obscure it. *Id.*
4. **PRIVILEGED COMMUNICATION.** — Publication charging plaintiff with gross misconduct in office, with arresting and handcuffing men without right, and oppressing the poor and friendless under color of his office of deputy sheriff, holds the plaintiff up to the scorn and aversion of honorable men, and the just reproach and censure of good people. Such publication is not a privileged communication; and if untrue, makes the publisher responsible in damages for the injury done by its publication. *Id.*
5. **REPUTATION OF OFFICER** cannot be destroyed or damaged by publication of false imputations upon his morality or honesty without redress. *Id.*
6. **REASON FOR PRIVILEGED COMMUNICATION**, which is supposed to be the accomplishment of the public good by a certain liberty of discussion and publication, cannot be applied to cases where the effect of the exercise of such privilege must necessarily result in public evil as well as private injury. There are cases where the promotion of the public good, in conflict with public evils, existing or to be feared, warrants a freedom of speech and license in publication in good faith which may be of injury to private persons without remedy or compensation to them. *Id.*
7. **QUESTION OF LAW.** — **WHERE PUBLICATION IS PLAINLY LIBELOUS** on its face, and needs no explanation to determine its character in that respect, the court may decide and rule it to be libelous; and if its meaning is plainly not libelous, the court may declare it not actionable, and instruct the jury accordingly. *Id.*
8. **QUESTION FOR JURY.** — Where any doubt exists as to the meaning of a publication, so that extrinsic evidence is needed to determine its character as to being actionable or non-actionable, it is then a question for the jury, under proper instructions, to find its significance. *Id.*
9. **ORDER OF PROOF.** — In libel, as in other actions, while the order of proof is sometimes discretionary, it is not safe practice to call upon the court to pass upon a proposed statement of fact which is irrelevant, unless shown to apply to the party, without first laying the foundation by showing that the witness can answer as to its application. *CAMPBELL, C. J. Id.*

10. IT IS NOT COMPETENT IN LIEN, as in other actions, to prove distinct facts in defense that have not been made a part of the issue as framed; therefore, extraneous specific charges cannot be gone into for any purpose. CAMPBELL, C. J. *Id.*
11. IN LIEN, GENERAL JUSTIFICATION requires the statements to be proved as alleged, and not otherwise. CAMPBELL, C. J. *Id.*
12. IN LIEN, GENERAL STATEMENTS of misconduct, not connected with the party, and not alleged as grounds of action, are not actionable, and proof of them is incompetent. CAMPBELL, C. J. *Id.*

LICENSE.

See THEATERS.

LIENS.

See MARRIED WOMEN; MECHANICS' LIENS.

LIS PENDENS.

WHEN PROPERTY ACTUALLY IN LITIGATION IS BOUGHT, PENDING SUIT, from a party thereto, though upon a valuable consideration, and without express or implied notice in point of fact, the purchaser is affected in the same manner as if he had notice, and will accordingly be bound by the judgment or decree in the suit. But the purchaser of land subject to the lien of a mortgage is not affected by *lis pendens*, where the title to the mortgage only was involved in the suit, and not the land itself. *Green v. Rick*, 790.

LOST PROPERTY.

See REPLEVIN.

LUNACY.

See INSANITY.

MARRIAGE AND DIVORCE.

MARRIAGE PROCURED BY DURESS WILL BE ANNULLED, where the consent of the petitioner, a boy of sixteen years of age, is shown to have been extorted by bastardy proceedings against him, maliciously and without probable cause instigated and set on foot by the petitioner, an unchaste, pregnant woman of mature age. *Shoro v. Shoro*, 118.

MARRIED WOMEN.

1. DEBT OF GENERAL CREDITOR OF MARRIED WOMAN DOES NOT CONSTITUTE ANY LIEN or charge upon her separate estate prior to the institution of a suit to subject such estate to the payment of such debt. Her general creditors have no priority over one another, unless it be acquired by superior diligence in proceeding to obtain satisfaction. *Pickens v. Knisely*, 622.
2. JUDGMENT AGAINST A MARRIED WOMAN on a contract made while she is living with her husband is absolutely void, and can create no lien on her separate estate. *White v. Foote L. Co.*, 650.
3. IF A MARRIED WOMAN IS DOING BUSINESS UNDER A COMPANY NAME, a judgment against her by such name is not less invalid than if entered against her by her proper name. *Id.*

4. PRESUMPTION IS THAT A MARRIED WOMAN IS LIVING WITH HER HUSBAND; and this presumption, unless removed by competent evidence, will overthrow, even on a collateral assault, a judgment entered against her during her coverture. *Id.*
5. IN TAKING AND CERTIFYING ACKNOWLEDGMENTS OF DEEDS OF MARRIED WOMEN, A LITERAL COMPLIANCE with the statute is not essential, but a substantial compliance is exacted. *Pickens v. Knischy*, 622.
6. IN CERTIFICATE OF ACKNOWLEDGMENT BY A MARRIED WOMAN, the words "willingly acknowledged the same" must be treated as the equivalent of the words "willingly executed the same," prescribed in the statutory form of acknowledgment. *Id.*
7. CERTIFICATE OF ACKNOWLEDGMENT OF DEED BY A MARRIED WOMAN MAY BE IMPRACHED AND AVOIDED by proving that she never in fact appeared before the officer, or acknowledged the deed to him; and this rule will be enforced against an innocent purchaser without notice that the certificate is false. But if she appeared before the officer for the purpose of making the acknowledgment, and attempted to do in some manner what the law required to be done, the certificate is conclusive of the facts therein stated, as regards innocent purchasers. *Id.*

See FALSE IMPRISONMENT; HUSBAND AND WIFE.

MASTER AND SERVANT.

1. STIPULATION BY EMPLOYEE THAT BEFORE LEAVING HIS EMPLOYMENT HE WILL GIVE TWO WEEKS' NOTICE, and that if he leaves without first giving such notice he will forfeit all moneys due him, is void; and the forfeiture cannot be enforced. *Schrumpf v. Tennessee M. Co.*, 832.
2. LAW DOES NOT IMPUTE TO ONE MAN NEGLIGENCE OF ANOTHER unless the relation of master and servant exists between them. To charge one man with the negligence of another, it is not sufficient to show that the latter was, at the time, acting under the employment of the former, but it must be shown that such employment created between them the relation of master and servant. *Palmer v. St. Albans*, 125.
3. MUNICIPAL CORPORATION IS NOT LIABLE FOR INJURIES RESULTING FROM NEGLIGENCE OF ITS EMPLOYEES in piling tiles at the direction of its street commissioner in the corporation yard, when the corporation neither owned the tiles, nor had the custody or control of them; but the commissioner, taking advantage of his official position, was acting, as to the tiles, not as the servant of the corporation, but as an individual for his private gain, the act of piling the tiles not amounting to a nuisance, and no public trust being involved. And in an action against such corporation to recover for such injuries, parol evidence is admissible to prove that it neither owned nor controlled the tiles, although they had been shipped to it, and a bill of them had been rendered to it, and allowed by the president of its board of trustees. *Id.*
4. SERVANT WHO ENGAGES TO PERFORM HAZARDOUS WORK TAKES RISKS INCIDENT THERETO; but if the master by any negligent act not involved in or reasonably incident to the work causes the servant to receive a personal injury, he is responsible therefor, if the servant did not otherwise contribute to the result. *Woodward v. Shumpp*, 716.
5. SERVANT MUST SHOW CASE CLEAR OF HIS CONCURRENT NEGLIGENCE, in an action by him to recover damages for injuries sustained through the negligence of the master; but when the measure of care which he ought

to have exercised shifts with circumstances, or has been varied by the master, the jury alone can determine whether he was guilty of contributory negligence. *Id.*

6. **SERVANT DOES NOT ASSUME RISK OF NEGLIGENCE OF FELLOW-SERVANT**, where the latter is engaged in a different department of the work or service; nor where the negligent servant is the superior, permanently or temporarily, of the injured one does the ordinary rule as to servants assuming risk for fellow-servant's negligence apply. *East Tennessee etc. R. R. Co. v. De Armond*, 816.
7. **TELEGRAPH OPERATOR IS NOT FELLOW-SERVANT OF CONDUCTOR**, although both are hired and paid by a common employer, and are engaged in an effort to accomplish a common result, to wit, the movement of trains, provided such operator has nothing to do with the actual movements or management of the trains, but is merely the agent through whom orders are transmitted regulating the same; such operator being also engaged in a different department of the service, and in a qualified degree a vice-principal of the train-dispatcher or superintendent, and so, in one sense, a superior. *Id.*
8. **DAMAGES — CONTRIBUTORY NEGLIGENCE**. — Conductor receiving telegram negligently given him by telegraph operator, which, upon its face, did not concern the movements of his own train, instead of making inquiries by means of which a collision and consequent injury to him might have been avoided, is guilty of such contributory negligence as may properly be considered in mitigation of damages. *Id.*
9. **NEGLECTANCE**. — **RAILROAD EMPLOYEE** invited on train for purpose of receiving his wages is entitled to no less care than any other person or passenger lawfully on board, so far as his safety is concerned, and where an employee who has gone upon a train for that purpose, and being old, feeble, and infirm, attempts, upon an invitation to leave, to alight therefrom while the train is slowly moving, he is not guilty of such negligence *per se* as to prevent recovery in action for damages for injury thereby sustained. *Louisville etc. R. R. Co. v. Stacker*, 840.
10. **NEGLECTANCE**. — **RAILROAD EMPLOYEE IS IMPLIEDLY INVITED TO LEAVE A PAY TRAIN** when, after having gone upon it for the sole purpose of obtaining his wages, he is settled with, and that purpose is accomplished; in such case the leaving is to be treated as done under order of the company, unless there is some apparent danger which would make such attempt obviously imprudent and dangerous. *Id.*
11. **NEGLECTANCE A QUESTION FOR JURY**. — Where a railroad employee by invitation of the company boards a pay train to receive his wages, and being old, feeble, and infirm, attempts, at the invitation of the company, to alight from the train while it is slowly moving, and is injured, the question of contributory negligence in such case is for the jury, who should consider the rate of speed, the physical condition of the injured party, and all the circumstances. *Id.*
12. **EVIDENCE**. — **IN ACTION AGAINST RAILROAD COMPANY** for injury to brakeman, caused by proximity to passing cars of negligently constructed awning at station, evidence is admissible as to the proximity of awnings at other stations on the road. *Nugent v. Boston etc. R. R. Co.*, 151.
13. **EVIDENCE**. — **UPON QUESTION WHETHER ORDINARY CARE WAS EXERCISED BY BRAKEMAN** who had sustained an injury from the proximity of a negligently constructed awning while rapidly ascending ladder on box-car, one who has had experience in going up and down such ladders for serv-

eral years may testify that they were not all alike, and that it required in consequence the undivided attention of a person ascending them. *Id.*

See PARENT AND CHILD.

MECHANICS' LIENS.

1. RELEASE EXECUTED BY MECHANICS AND MATERIAL-MEN, DURING PROGRESS OF CONSTRUCTION OF BUILDINGS, of "all manner of liens, claims, and demands whatsoever, which we, or any or either of us, now have, or might or could have, on or against the said buildings," operates to discharge the buildings from their liens for work done and materials furnished after as well as before its execution. It is an unconditional agreement to look to the personal responsibility of the owner in lieu of the structures. *Brown v. Williams*, 689.
2. LIEN GIVEN BY STATUTE TO MECHANICS AND LABORERS, NOTICE OF WHICH has been filed as prescribed by the statute, attaches to the property upon which the labor or materials were bestowed, and has relation back to the time when the work was commenced or the materials furnished; and is effectual against every other lien or encumbrance which attached subsequently, and also against purchasers for value and without notice. *Burr v. Maullsby*, 517.

MINES AND MINING.

See EASEMENTS, 8-5.

MORTGAGES.

1. CHATTEL MORTGAGE—DEED OF TRUST. — Trustee in a deed of trust, who takes possession of the property for the purposes specified in the deed, before the levy of an attachment, may hold it for such purposes, notwithstanding there was an agreement between the *cestui que trust* and debtor at the time of the execution of the deed that the latter might sell the property in the usual course of business for his own benefit. *Dobyns v. Meyer*, 32.
2. CHATTEL MORTGAGE GIVEN TO SEVERAL persons jointly may be made to cover separate debts, and either mortgagee may enforce his claim by foreclosure, or the mortgagees may foreclose jointly. *Lyon v. Ballentine*, 284.
3. IF CHATTEL MORTGAGE, BY MISTAKE OR WANT OF KNOWLEDGE, is given for more or less than the actual indebtedness, and no deception or fraud is practiced by either party, it will not have the effect of invalidating the mortgage. *Id.*
4. CHATTEL MORTGAGE TAKEN SUBJECT TO A PRIOR ONE properly made and executed is valid. *Id.*
5. CHATTEL MORTGAGE. — BREACH OF ANY OF THE CONDITIONS of a chattel mortgage entitles the mortgagee to take possession and foreclose. *Id.*
6. CHATTEL MORTGAGE SPECIFYING NO TIME OF PAYMENT is due without demand, and can be foreclosed immediately. *Id.*
7. FORECLOSURE OF CHATTEL MORTGAGE—GARNISHMENT. — When chattels are in the hands of a sheriff for the foreclosure of two mortgages against them, held by three different partnerships, and a writ of garnishment is then served on the mortgagees, they cannot be held as garnishees, when none of them has ever been in joint possession of any of such chattels, and none of them is indebted to the mortgagor, and none of them has any property for which they are jointly or severally liable to him. *Id.*

8. **WHAT IS.** — A conveyance, assignment, or other instrument transferring an estate is considered in equity a mortgage, if originally intended as security for the payment of money, whether such intention appears from the same instrument or any other. *Campbell v. Roddy*, 889.
9. **DEED.** — CONVEYANCE IN FORM OF DEED, "UNDER AND SUBJECT" TO LIEN OF MORTGAGE securing the grantor's bond, creates a covenant on the part of the grantee to indemnify the grantor against the mortgage debt. *Green v. Eick*, 790.
10. **PURCHASER OF LAND SUBJECT TO MORTGAGE HAS RIGHT TO SUPPOSE**, in the absence of notice to the contrary, that the ownership of the mortgage was as it appeared upon the record, and having made payment in good faith upon this assumption, he is entitled to protection, upon the principle that when one of two innocent persons must suffer loss by the default of a third, their rights being otherwise equal, that one should bear the loss who put it in the power of the defaulter to inflict it. *Id.*
11. **PARTIES.** — RIGHTS OF MORTGAGEES OF LANDS MAY BE AFFECTED in an action for an accounting in which it may become necessary to sell the lands and distribute the proceeds, and they ought, therefore, to be made parties to such action. *Pitt v. Moore*, 489.
12. **STATUTE OF FRAUDS — MORTGAGE SALE — LACHES.** — Parol agreement that the second mortgagee is to buy at the sale under the first mortgage, and allow the mortgagor a reasonable time to redeem by paying the amount bid, the second mortgage debt, and other adjusted accounts, is not within the statute of frauds, nor is the mortgagor guilty of laches if he begins his action to redeem within three years and a quarter after the sale. *Turner v. Johnson*, 62.
13. **MORTGAGEE IN POSSESSION IS HELD** to the exercise of that care and diligence which a prudent man would exercise in respect to his own property. *Id.*
14. **MORTGAGEE IN POSSESSION IS NOT LIABLE** for more than the rents actually received, unless he is guilty of fraud or negligence. *Id.*
15. **MORTGAGEE IN POSSESSION WHO ATTENDS** to the business through agents is not allowed compensation for his own trouble, but reasonable expenses paid an agent to superintend work, lease the land, and collect rents are proper matters of credit. *Id.*
16. **MEASURE OF DAMAGES.** — **MORTGAGEE IN POSSESSION** who sells the premises is liable only for the value of the land at the date of sale, in the absence of circumstances calling for the exercise of any rigor. *Id.*
17. **SECOND MORTGAGEE WHO PURCHASES PREMISES** to protect himself, at the request of the mortgagor, who, it is agreed, may redeem, is subrogated to the rights of the first mortgagee, and entitled to the interest specified in the first mortgage. *Id.*
18. **RES JUDICATA — JUDGMENT OF FORECLOSURE NOT AN ESTOPPEL AS TO HEIRS.** — Where a father conveys land to his son, and takes a note secured by mortgage for the purchase-money, payable to his legal heirs four years after his death, interest thereon payable to himself during his life, and afterwards brings suit to foreclose for non-payment of such interest, making the grantee sole defendant, obtaining a decree for the interest due, and for the sale of the land if such interest is not paid, after which it is paid without sale, such proceeding is not *res judicata*, nor does it work an estoppel as against the heirs, in an action between them and their father's administrator for the recovery of the money due on the

note, as the proper parties litigant as to its ownership never were before the court, and their co-heir could not, by silence or inaction, admit away their rights. *Loce v. Francis*, 290.

See BONDS, 2, 3, 6; COSTS, 8; FIXTURES, 2, 3; INSURANCE, 6, 7; LES PENDING; PAYMENT, 6; VENDOR AND VENDEE, 8.

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL CORPORATIONS. — POWER CONFERRED BY CHARTER UPON MUNICIPAL CORPORATION TO OPEN, GRADE, and pave streets, and to construct such gutters and sewers as in its judgment the public convenience may require, and to repair the same whenever needed, is discretionary or quasi-judicial, which the corporate authorities cannot be compelled to execute unless the terms of the statute are imperative. But any particular plan that may be adopted must be a reasonable one, and the manner of its execution thence becomes, with respect to the rights of the citizen, a mere ministerial duty; and for any negligence and unskillfulness in the execution or construction of the work, whereby injury is inflicted upon private right, the municipality will be held responsible. *Hitchins v. Mayor*, 422.**
2. **MUNICIPAL CORPORATION INCURS LIABILITY** when the property of private persons is flooded, either directly or by water being set back, when this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts, or sewers, or of the negligent failure to keep the same in repair, and free from obstruction, and this whether the lots are below the grade of the streets or not. *Id.*
3. **TO RENDER MUNICIPAL CORPORATION LIABLE IN ACTION FOR DAMAGES TO PLAINTIFF'S PROPERTY**, caused by the overflow of surface water, resulting from the defective condition of a sewer constructed to receive and carry off such water, the jury must find that the defendant had notice, either direct or inferential by lapse of time, of the defective and insufficient condition of the sewer, and the injury resulting therefrom. *Id.*
4. **MUNICIPAL CORPORATION CANNOT, IN CONSTRUCTION OF PUBLIC WORK**, divert the flow of surface water, gather it in volume and force, and empty it upon private property, without becoming liable therefor. It is the duty of the corporation to provide by adequate means for passing off the water thus concentrated in volume, so as to avoid doing damage to private property; and if it allows the water to accumulate in large quantities at the mouth of a sewer, and thence flow back upon private property, this constitutes a nuisance, and for neglect of the duty to remove it, the corporation is liable. *Id.*
5. **IN ACTION AGAINST MUNICIPAL CORPORATION FOR DAMAGES CAUSED BY OVERFLOW OF SURFACE WATER** into the plaintiff's cellar, if the injury complained of was sustained by reason of the backing of the water from the mouth of a sewer or culvert constructed by the defendant, where it had been brought in large quantities by artificial drains, and such backing and overflow were caused by the defective and insufficient sewer or culvert, and would not have occurred but for that cause, then the fact that the floor of the plaintiff's cellar had been lowered by a prior owner will afford no justification to the defendant for the defective and insufficient sewer. *Id.*
6. **CITY IS NOT ANSWERABLE FOR ACT OR NEGLECT OF CONTRACTORS WHO ARE CONSTRUCTING A SEWER** in one of its streets, and who, while engaged in the prosecution of their work, fire off a blast, whereby plain-
AM. ST. REP., VOL. VI.—61

tiff's horses, then on an adjacent street in perfect repair, are frightened, and the plaintiff, while attempting to control them, suffers serious injuries. *Herrington v. Lanstingburgh*, 348.

7. **MUNICIPAL CORPORATION IS NOT LIABLE FOR DAMAGE BY FIRE TO PROPERTY** of a citizen, resulting from its failure to provide suitable apparatus and a sufficient supply of water to extinguish the flames, or from the inefficiency, carelessness, and neglect of its firemen, or of the officers in charge of them, and whose operations it is their duty to direct, although it levies a water tax annually, and engages to have constantly available an abundant supply of water for all purposes. *Wright v. Augusta*, 256.
8. **MUNICIPAL CORPORATION IS LIABLE FOR NEGLIGENCE ONLY IN CASES** where the negligence or non-feasance of its ordinary agents and servants, as distinguished from that of its officers, causes the injury, or where the loss results from acts merely ministerial, as distinguished from such as are legislative and governmental in character, exercised for the sole and immediate benefit of the public, or where the corporation, as a corporation, is exercising its private franchise powers and privileges which belong to it for its immediate corporate benefit, or is dealing with property held by it for its corporate advantage, gain, or emolument, though insuring ultimately to the benefit of the general public. *Id.*
9. **MUNICIPAL CORPORATION.—COURT OF EQUITY WILL NOT ENJOIN CITY FROM REBUILDING AND ENLARGING CULVERT** across a street, upon the complaint of a property-owner alleging that by reason of the increased volume of water consequent upon the work proposed his lot will be injured, although for fifteen years the water was carried through a more limited channel. *Scranton City's Appeal*, 755.
10. **CONSTITUTIONAL LAW.—LEGISLATURE HAS NO POWER** to subject the people of cities to the uncontrolled and arbitrary will of a common council, nor deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers. *In re France*, 310.
11. **MUNICIPAL CORPORATIONS.—TO BE VALID FOR ANY PURPOSE, ALL CITY CHARTERS, LAWS, AND REGULATIONS** must be capable of construction, and must be construed in conformity to constitutional principles, and in harmony with the general laws; and any by-law which violates any of the recognized principles of legal and equal rights is necessarily void so far as it does so, and void entirely if it cannot be reasonably applied according to its terms. *Id.*
12. **MUNICIPAL CORPORATIONS.—CITY CHARTER** and the power it assumes to grant can only confer such power over the subjects referred to as will enable the city to keep order and suppress mischief, in accordance with the limitations and conditions required by the rights of the people, and no grant of absolute discretion to suppress lawful action altogether can be granted at all. Regulation, and not prohibition, unless under clear authority of the charter, and in cases where it is not oppressive, is the extent of the city power. *Id.*
13. **MUNICIPAL CORPORATIONS.—REGULATION OF SALVATION ARMY PROCESSIONS.**—An ordinance providing that "no person or persons, association or organizations, shall march, parade, ride, or drive in or upon or through the public streets of the city, . . . with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without first having obtained the consent of the mayor or common council of such city, . . . funeral and military processions excepted; but such

processions, as well as those having the permit or consent of the mayor or common council, when using the public streets of such city, shall conform to such directions as the mayor or chief of police may give in relation to the streets to be used and the portion thereof to be occupied by them, and in relation to the manner of such use," and providing a penalty by fine not exceeding five hundred dollars for conviction of violation of such ordinance, — is unreasonable and void, because it suppresses what is, in general, perfectly lawful, and because it leaves the power of permitting or restraining processions — in this case, a salvation army procession — and their courses to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent legal provisions, operating generally and impartially. *Id.*

See MASTER AND SERVANT, 3; NUTRANCE, 1, 2.

MURDER.

See CRIMINAL LAW.

NEGLIGENCE.

1. **INSURANCE PATROL COMPANY, CONSTITUTING PUBLIC CHARITY, IS NOT LIABLE FOR NEGLIGENCE OF ITS EMPLOYEES**, it having no property or funds other than that contributed for the purposes of charity. *Fire Ins. Co. v. Bowd*, 745.
2. **OCCUPANT OF REALTY IS NOT LIABLE FOR INJURIES RESULTING FROM NEGLIGENT USE OF PERSONAL PROPERTY ON IT**, when such personal property is neither owned nor controlled by him, unless such use amounts to a nuisance. *Palmer v. St. Albans*, 125.
3. **IT IS DUTY OF AGRICULTURAL SOCIETY TO RENDER REASONABLY SAFE TO ALL PERSONS** lawfully in attendance the place in which it holds its public exhibitions. And it is a question of fact for the jury to determine whether such society is guilty of negligence in permitting, during its exhibition, a striking-machine to be used on its grounds, without a guard around it, whereby a person is injured. The court cannot assume, as matter of law, that such machine was not there by the society's permission. If it cannot be assumed that the machine was there by license, it is a question of fact whether it had been so long upon the ground that the society ought, in the exercise of reasonable care, to have known of its presence. *Selinas v. Vermont etc. Soc.*, 114.
4. **EVIDENCE. — OWNER OF PREMISES IS NOT LIABLE IN DAMAGES FOR INJURY SUSTAINED BY ANOTHER** while lawfully thereon, in the absence of any evidence as to the direct cause of the injury, or that it was the result of the owner's negligence. *Huey v. Gahlenbeck*, 790.
5. **IF ONE USES MACHINERY IN HIS BUSINESS, AND FAILS** to provide it with proper appliances to insure in its operation the safety of the property of others, he is liable for any loss resulting from such failure, unless the party sustaining the loss contributed thereto by his own lack of care. *Newby v. Harrell*, 503.
6. **ACTS CONSTITUTING CONTRIBUTORY NEGLIGENCE, SUCH AS WILL DEFEAT RECOVERY**, must be the proximate and not the remote cause of the injury. By "proximate cause" is intended an act which directly produced, or concurred directly in producing, the injury; by "remote cause" is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened. *Troy v. Cape Fear R. R. Co.*, 522.

7. PARTY CANNOT RECOVER DAMAGES FOR NEGLIGENCE INJURY which, by the exercise of reasonable care, he might have avoided. *Delaware etc. R. R. Co. v. Cadore*, 730.
 8. VERDICT SHOULD BE DIRECTED FOR DEFENDANT IN ACTION FOR PERSONAL INJURIES CAUSED BY DEFENDANT'S NEGLIGENCE, where the uncontroverted facts show that the plaintiff, a cripple with a stiff leg, left a safe path, which he had often traveled, along the sidewalk of a street, to go hastily, in the night-time and without a light, diagonally across a plank railroad crossing, the condition of which he did not know, and got off the crossing, stumbled among the rails, fell, and was injured. *Id.*
 9. NEGLIGENCE IS ORDINARILY QUESTION FOR JURY, but when the facts are uncontroverted, their legal effect is for the court. *Id.*
 10. QUESTION OF CONTRIBUTORY NEGLIGENCE IS PROPERLY FOR THE JURY where the facts though undisputed are such that different inferences may be fairly drawn therefrom, or are those upon which fair-minded men may reasonably arrive at different conclusions. *Nugent v. Boston etc. R. R. Co.*, 151.
 11. WHETHER PLAINTIFF HAS BEEN GUILTY OF CONTRIBUTORY NEGLIGENCE IS QUESTION OF FACT for the jury under proper instructions from the court. *Selinas v. Vermont etc. Soc.*, 114.
- See BAILMENTS; HIGHWAYS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; RAILROADS; TELEGRAPHS.

NEGOTIABLE INSTRUMENTS.

1. WHEN IT IS SHOWN IN ACTION ON PROMISSORY NOTE BY INDORSEE AGAINST MAKER that the note was obtained without consideration by the original payee, and that he fraudulently transferred it, contrary to the express protest of the maker, the burden is on the plaintiff, to entitle him to recover, to establish that he is the *bona fide* owner of the note, and that he acquired it for value before maturity, without notice or knowledge of any infirmity in its origin or its transfer. *Williams v. Huntington*, 477.
2. MERE FACT THAT NOTE HAS BEEN PURCHASED AT DISCOUNT will not, ordinarily, be evidence of bad faith, but where the discount is very large, that circumstance may be considered, in connection with all the other facts, in determining the question of the purchaser's good faith. *Id.*
3. QUESTION OF FRAUD OR BAD FAITH ON PART OF HOLDER OF NOTE is to be determined from all the facts attending its purchase by him, without reference to the supposed or assumed conduct of others if situated as he was. *Id.*
4. BONA FIDE PURCHASER OF COMMERCIAL PAPER FOR VALUE, BEFORE MATURITY, without notice or knowledge of any defects in it, acquires title thereto against the world, and his right of recovery thereon is not restricted to the sum actually paid by him, but he is entitled to recover the amount of the paper in full. *Id.*
5. PROTESTING FOREIGN BILL OF EXCHANGE — EVIDENCE. — If a notary presents such bill for payment in business hours, at the usual place of business of acceptor, and finds it closed, no explanation being furnished as to why it is closed, he may protest the bill for non-payment, except in case of permanent abandonment and removal to another place of business. It is not incumbent upon him, in such case, to call at the acceptor's residence, and the notary's certificate embodying a statement of such facts is sufficient. *Sulzbacher v. Charleston Bank*, 828.

6. **NOTARY'S PROTEST OF FOREIGN BILL OF EXCHANGE PRESENTED FOR PAYMENT IS NOT CONCLUSIVE**, but only evidence of such facts as are proper to be stated in it; it may always be rebutted by other evidence showing how the demand was made, or that proper diligence was not used to make it, or that there was a permanent abandonment and removal to another place of business in the same city. *Id.*
 7. **BILL OF EXCHANGE. — SAME DEGREE OF DILIGENCE DOES NOT ALWAYS DEVOLVE UPON NOTARY** in case of presentment for payment as in case of presentment for acceptance. *Id.*
 8. **RECOVERY MAY BE HAD IN ACTION AT LAW ON LOST NOTE** payable to order, but not negotiated, although it is not shown to have been destroyed. *Clark v. Snow*, 108.
- See BONDS, 3-6; INSOLVENCY; PAYMENTS, 6.

NEW TRIAL.

PEACOCK. — UNDER POWER VESTED BY MARYLAND CODE, article 5, section 16, the court will reverse the judgment appealed from, and award a new trial in a clear case, although the judgment ought to be affirmed. *Earnshaw v. Sum M. A. Soc.*, 460.

NOTARIES.

See NEGOTIABLE INSTRUMENTS, 5-7.

NUISANCE.

1. **A CITY MAY BE ENJOINED FROM MAINTAINING SEWERS BY WHICH SEWAGE IS COLLECTED** and then carried upon plaintiff's lands, whereby waters there used by him are polluted and the banks of a stream are covered by filthy and unwholesome sediment. *Chapman v. Rochester*, 368.
2. **ESTOPPEL. — ACQUIESCENCE IN THE PROCEEDINGS OF A CITY IN DEVISING AND CARRYING OUT A SYSTEM OF SEWERAGE** will not estop the plaintiff from enjoining a nuisance created by such system, if he did not, by word or act, induce the city authorities to so direct the sewers that their flow should reach his premises. *Id.*
3. **TO PREVENT THE POLLUTION OF AIR OR WATER**, an injunction will issue at the instance of the party injured. *Id.*
4. **DEFENDANT IN ACTION ON CASE FOR NUISANCE CANNOT OBJECT ON ERROR THAT DECLARATION SHOULD HAVE SET FORTH PREVIOUS VERDICT AND JUDGMENT** recovered by the plaintiff against the defendant for the erection and continuance of such nuisance, and then have charged a continuance of the nuisance, instead of charging its erection as at a time subsequent to such verdict and judgment and its continuance from that time, where he waived the objection by going to trial on a plea of not guilty, instead of pleading the former recovery in bar, and where he was not injured, because under the plea he was not prevented from setting up such recovery as a bar to a recovery for the original erection, and the plaintiff was allowed to recover only for the continuance. *Ellis v. American Academy of Music*, 739.
5. **ONE IS ENTITLED TO DAMAGES FOR CONTINUANCE OF NUISANCE**, established by a former verdict and judgment, although the continuance of the obstructions causing the nuisance did not materially injure him. *Id.*
6. **PUNITIVE DAMAGES FOR CONTINUANCE OF NUISANCE MAY BE GIVEN BY JURY**, in an action brought after a former recovery by the plaintiff against the defendant. *Id.*

7. **GATE CLOSING PRIVATE ALLEY, AND ROOF COVERING IT, MAY BE PROPERLY ASSUMED TO BE NUISANCES PER SE** by the court in its charge to the jury, in an action to recover damages for the continuance of the same as nuisances, brought by one adjoining owner against another, to whose lands the alley was made appurtenant, after a former recovery by the plaintiff against the defendant, the erections having been made after the grant to the plaintiff, and without his consent. *Id.*

OFFICE AND OFFICERS.

1. **OFFICERS ARE PRESUMED NOT TO ABUSE THEIR FUNCTIONS**, and one lawfully employing them is not liable if they do, unless he orders, encourages, or sanctions it. *Sutherland v. Ingalls*, 332.
2. **FORMAL REQUISITES FOR VALIDITY OF OFFICIAL ACTS ARE PRESUMED** when such acts are shown to have been done in a manner substantially regular. *Adams v. Cowles*, 74.

PARENT AND CHILD.

1. **POTATIVE FATHER MAY LAWFULLY MAKE PROVISION FOR HIS ILLEGITIMATE CHILD**, or for the illegitimate offspring of such child, whether such child or offspring be white or colored. *Smith v. Du Bose*, 260.
2. **FATHER'S RIGHT TO CONTROL THE CUSTODY OF HIS CHILDREN CEASES WITH HIS LIFE**. He cannot make any contract regarding their custody or services which will control them after his death, unless by indentures of apprenticeship in conformity with the provisions of some statute. *State v. Reuff*, 676.
3. **ON DEATH OF THE FATHER OF MINOR CHILDREN, THEIR MOTHER BECOMES ENTITLED TO THEIR CUSTODY**, notwithstanding the father in his lifetime placed them in custody of some other person, and agreed that they should remain in such custody during their minority. *Id.*
4. **RIGHT OF MOTHER TO CUSTODY OF HER CHILDREN IS NOT TERMINATED BY HER SECOND MARRIAGE**. *Id.*
5. **AGREEMENT BY FATHER WITH AN ORPHANS' HOME OR ASYLUM**, whereby he surrenders to it his minor child, and relinquishes all power and control over such child, and the Home covenants to receive and provide for the child in accordance with the provisions of the statute of the state, becomes inoperative on the death of the father. One receiving the child from the Home cannot acquire any greater or more enduring right to the custody of the child than the Home itself had. *Id.*
6. **MOTHER WILL BE AWARDED THE CUSTODY OF HER CHILD, ON HABEAS CORPUS**, notwithstanding the return shows that the child is in the care of another person, who, having no children, regards it with the same affection as he would a child of his own, and is able to rear it more indulgently, educate it more highly, and provide for its future more abundantly than its mother. *Id.*
7. **FATHER IS ENTITLED TO LABOR AND SERVICE OF HIS MINOR CHILD, AND MAY MAINTAIN AN ACTION** to recover for the services of such child rendered to any third person. It seems that marriage of the child without the father's assent will not impair his right to recover for its services. *Halliday v. Miller*, 653.
8. **FATHER MAY VOLUNTARILY RELINQUISH HIS RIGHT** to his child's earnings; and when he does so, his child is said to be emancipated. The emancipation may be parol or in writing, or may be inferred from circumstances. *Id.*

9. **INSOLVENT FATHER HAS THE RIGHT TO EMANCIPATE HIS SON**, and to relinquish all claim to the latter's earnings. *Id.*
10. **CONVEYANCE BY FATHER TO SON, IN CONSIDERATION OF MONIES RECEIVED FOR THE EARNINGS OF THE SON WHILE HE WAS AN UNEMANCIPATED MINOR**, is without valid consideration, and therefore fraudulent and void as against the creditors of the father. *Id.*
11. **A MINOR IS ENTITLED TO RETAIN FOR HIS OWN USE HIS BOUNTIES AND PAY AS A SOLDIER**; and if they are received by his father, the latter becomes indebted to his son for the amount thereof, and may, to discharge such debt, convey real property to the son. Such conveyance is not voluntary, and cannot be avoided by the father's creditors. *Id.*

See HABEAS CORPUS, 3.

PARTNERSHIP.

1. **PARTNER WHO VOLUNTARILY PAYS FIRM DEBTS** with his individual means does not thereby become a firm creditor for the amount paid, so as to be subrogated to the rights of the creditors whose debts he paid, in a state where partnership debts are joint and several. He only has the right to bring the payments into his accounts, and after the other firm debts are paid, the amount he paid goes to his credit in a settlement between the partners. *Lyons v. Murray*, 17.
2. **VOLUNTARY PAYMENT OF FIRM DEBT BY ADMINISTERING PARTNER, FRAUDULENT AS TO INDIVIDUAL CREDITORS.** — Where one partner, on the death of the other, administers on the partnership estate, and pays out of his individual property a firm debt due a creditor, and then, on final distribution of the estate, obtains an order of court, and pays forty-two per cent of the same debt out of the firm assets, such payment, being for no consideration, is void as to the administrator's creditors, he being largely indebted at the time, even though the creditor paid is innocent of any fraudulent intent. *Id.*
3. **INDIVIDUAL CREDITORS OF PARTNER** who is acting as administrator of the partnership estate on the death of the other partner are not parties or privies to the order of distribution of firm assets, so as to be bound thereby, when the administering partner is alive at the time and his individual property is not in liquidation. *Id.*
4. **IF ONE PARTNER TRANSFERS TO STRANGER PARTNERSHIP PROPERTY** not held for the purpose of trade or sale, the transfer being made without the knowledge or consent and in fraud of the rights of his copartner, the latter may maintain trover against the transferee who refuses to surrender possession of the property on demand. *McNair v. Wilcox*, 799.
5. **GENERAL RULE IS, THAT ONE PARTNER CANNOT MAINTAIN ACTION AGAINST HIS COPARTNER** to recover money which might be placed as an item in the partnership account until after a settlement of all partnership business; but he may, before such settlement, maintain an action against his copartner for the destruction of the joint property, or its wrongful conversion, or for injury to his individual property used in the business, if such injury is the result of the negligence or tort of the copartner. *Newby v. Harrell*, 503.
6. **ALL THE PARTNERS HAVE RIGHT TO BE HEARD** before a court when it is sought to deprive them of their property on a charge of fraud, actual or constructive, arising out of their contract relations with others, and any proceeding which does not accord to them this right in court is illegal. *Lyon v. Ballentine*, 284.

See CO-TENANCY.

PAYMENTS.

1. **PAYMENT, PRESUMPTION OF FROM LAPSE OF TIME.** — **ALL DEBTS EXCEPT** OUT OF STATUTE OF LIMITATIONS, UNCLAIMED and unrecognised for twenty years, are, in the absence of sufficient explanatory evidence, presumed to have been paid. *Gregory v. Commonwealth*, 804.
2. **PRESUMPTION OF PAYMENT AFTER LAPSE OF TWENTY YEARS** is an artificial and arbitrary rule of law, and, unlike the statute of limitations, is not a bar to an action on the original contract, and therefore a new promise is not necessary to sustain an action upon the debt. This being so, it is of no consequence that the admission of non-payment is accompanied by a refusal to pay. *Id.*
3. **FACTS AND CIRCUMSTANCES RELIED UPON TO REBUT PRESUMPTION** of payment from lapse of time must necessarily be within twenty years before the suit is brought, and the evidence to rebut such presumption must be satisfactory and convincing, especially when suit is not brought until after the debtor's death. *Id.*
4. **EVIDENCE ADMISSIBLE TO SHOW THAT DEBT IS IN FACT UNPAID** may consist of the defendant's admissions made to the creditor himself, or to his agent, or even to a stranger. But an admission will not be as readily implied from language casually addressed to a stranger as when addressed to the creditor in reply to a demand for payment of the debt. *Id.*
5. **WHETHER MATTERS SOUGHT TO BE ESTABLISHED IN REBUTTAL OF PRESUMPTION** of payment from lapse of time are true, is a question for the jury; but whether the facts and circumstances relied on, if true, would amount to a rebuttal of the presumption, is necessarily a question of law for the court. *Id.*
6. **PAYMENT OF MORTGAGE NOTE IS NOT PRESUMED UNTIL FIFTEEN YEARS** have elapsed since its maturity. *Smith v. Niagara F. I. Co.*, 144.

PERPETUITIES.

1. **PERPETUITIES.** — **WHERE, BY TERMS OF DEED OF TRUST, ESTATE IS LIMITED TO GRANTEE FOR LIFE**, with a general power of appointment by will, with full power also to convey in fee or by mortgage, the latter power, though not exercised, renders the life estate destructible by the grantee in his lifetime; and so far as the application of the rule against perpetuities to the power of appointment by will is concerned, the estate of the grantee is to be regarded as though it were an estate in fee. *Mifflin's Appeal*, 781.
2. **INDESTRUCTIBILITY OF ESTATE OF PERSON WHO, FOR TIME BEING, IS ENTITLED** to the property subject to the future limitation, is an essential element in the definition of a perpetuity. An estate which can be destroyed by the person who holds it for the time being is not indestructible. *Id.*

PLEADING AND PRACTICE.

1. **EXCEPTION TO RULE REQUIRING ALL PARTIES TO BE BEFORE COURT.** — Cases in which the parties in interest are so numerous as to make it impracticable or greatly inconvenient and expensive to bring them all before the court form an exception to the rule that all persons having an interest in the subject-matter of the litigation should be before the court. And this exception applies to defendants as well as to plaintiffs. In a suit against a large number of persons, it is sufficient that such a number be made defendants as will fairly represent the interests of all

- standing in like character and responsibility. *Devey v. St. Albans T. Co.*, 84.
2. TRIAL OF A CAUSE UPON THE THEORY THAT THE COMPLAINT INCLUDES A PARTICULAR CAUSE OF ACTION, without objection, precludes the defendant from objecting in the appellate court that such cause was not alleged in the complaint. *Tarbell v. Royal E. S. Co.*, 350.
3. AMENDMENT IS PROPERLY MADE IN STRIKING WIFE'S NAME FROM RECORD after verdict in an action on the case against a husband and wife, leaving the judgment to stand against the husband alone. *Williams v. Hay*, 719.
4. STIPULATION OR AGREEMENT REGARDING THE DISPOSITION OF A CAUSE will not be permitted to affect the rights of persons who are not parties to it nor to the action. *Western L. Asylum v. Miller*, 644.
5. REQUEST TO CHARGE IS PROPERLY REFUSED, AS ASSUMING VERY POINT IN CONTROVERSY, where, in an action to recover damages for injuries received by a foot-passenger by being struck by a wagon at a street-crossing, the defendant asks the court to rule that if the jury believed that at the time of the accident "the defendant's driver was traveling in an ordinary manner, the defendant is not liable for an injury resulting from the use of a public street." The question was, whether the driver was traveling over the public crossing with the ordinary care requisite when passing such a point. *Schmidt v. McGill*, 713.
6. QUESTION WHICH PARTY WAS NEGLIGENT, IF EITHER, IS NATURAL AND MATERIAL ONE, the solution of which is for the jury, where a foot-passenger is injured by being struck by a wagon at a street-crossing, where both team and passenger had the right of way, and where both were required to use care. *Id.*
7. EVIDENCE — QUESTION FOR JURY. — WHERE EVIDENCE IS CONFLICTING AS TO CAUSE of the injury sustained, the question should be submitted to the jury, under proper instructions from the court. *Troy v. Cape Fear R. R. Co.*, 521.
8. PARTICULAR REFERENCE TO TESTIMONY IN CHARGE TO JURY IS UNNECESSARY, where the testimony is neither complex nor voluminous, and the attention of the jury is clearly called to the law of the case. *Schmidt v. McGill*, 713.
9. INSTRUCTIONS. — It is not the duty of the court to charge the jury upon a single selected fact, nor is he bound to give the charge in the language asked. *Michael v. Foll*, 577.
10. INSTRUCTIONS ARE TO BE TAKEN as a whole, and if they present all the issues made by the evidence, are not open to objection as erroneous. There is no necessity for qualifying each instruction by an express reference to the others. *Owens v. Kansas City etc. R'y Co.*, 39.
11. PARTY CANNOT COMPLAIN OF INSTRUCTION AS ERRONEOUS, when the instructions given at his request contain the same vice. *Hasell v. Tipton Bank*, 22.
12. NO REVERSAL FOR IMMATERIAL ERROR. — ALTHOUGH INSTRUCTIONS ARE ERRONEOUS as to what is necessary to make a contract, yet if the contract to which they are applied is itself void, such error is immaterial, and no reversal can be predicated thereon. *Merchants' D. T. Co. v. Bloch*, 847.
13. VERDICT — NO GROUND FOR REVERSAL. — IF, IN VIEW OF FINDING BY JURY, certain legal propositions embodied in requests to charge become mere abstractions, their rejection could work no injury to the party

- excepting, and constitutes no ground for reversing the verdict. *Stumore v. Shaw*, 412.
14. COURT IS NOT REQUIRED TO GIVE INSTRUCTIONS, THOUGH PROPER, and such as the party is entitled to, in the very terms asked; and if such as are asked for to which the party is entitled are embodied substantially in the charge as given, it is sufficient. *Newby v. Harrell*, 503.
 15. EXCEPTION TO ENTIRE CHARGE OF COURT as set out in the record, without specifying the errors therein or the grounds of exception, is too indefinite, and cannot be considered. *Id.*
 16. WHERE INSTRUCTION GIVEN FOR GUIDANCE OF JURY MAKES NO REFERENCE TO PLEADINGS in the case, the jury are not required to look at them to ascertain how they are to find, and counsel for the plaintiff will not be permitted to read the declaration to the jury and argue that its allegations were sustained by the evidence in the case. To permit this would be simply to allow an appeal from the court to the jury. *Hickins v. Mayor etc. of Frostburg*, 422.
 17. WHETHER JURY SHOULD TAKE WITH THEM INTO JURY-ROOM PLEADINGS in any case, is matter within the discretion of the trial court, and is not the subject of review on appeal. *Id.*
 18. NONSUIT. — WHEN, UPON CLOSE OF TESTIMONY, PRESIDING JUDGE INTIMATES OPINION that in no reasonable view of the evidence produced could the plaintiff recover, and, in deference to this opinion, the plaintiff submits to a nonsuit, and appeals, the evidence must be accepted as true in the appellate court, and taken in the most favorable light for the appellant, because the jury might have taken that view of it if it had been submitted to them. *Springs v. Schenck*, 552.
 19. SPECIAL FINDING OF FACT BY THE COURT WILL BE REVERSED FOR ERRONEOUS APPLICATION OF THE LAW in case tried by court without a jury. *Deckerick v. Oulds*, 812.
 20. QUESTION, THOUGH IMPROPER, IF NOT SHOWN TO HAVE BEEN ANSWERED by the witness to whom it was put, is not ground for reversal. *Smith v. Niagara F. Ins. Co.*, 144.
 21. APPEALABLE ORDER. — Order denying defendant's application for leave to appear and answer is an appealable order. *Read v. Patterson*, 877.
 22. OBJECTIONS NOT MADE ON MOTION FOR NEW TRIAL are not noticed on appeal. *Turner v. Johnson*, 62.
- See ASSIGNMENTS FOR BENEFIT OF CREDITORS; COMMON CARRIERS, 18; COVENANTS; EQUITY; EXECUTORS AND ADMINISTRATORS, 6; LIEBEL; NEW TRIALS; PARTNERSHIP, 5, 6; SLANDER.

POWERS.

POWER OF APPOINTMENT GIVEN BY TESTATOR TO HIS SON DOES NOT AUTHORIZE APPOINTMENT OF FORFEITABLE ESTATE TO APPOINTEE, or the creation by the donee of a spendthrift trust, but the appointee takes an indefeasible estate in fee under the will, he being the only member of a class to which the estate was limited by the will, where a testator gave the share of a son to trustees, in trust for his use for life, "and from and after his death, then to the use of such of his children and issue, and in such shares and for such estates, as he shall by last will appoint, and in default of such appointment, then to the use of all of his children that may be living at his death," etc., and the son afterwards died, leaving as his only issue a child born after the death of the grandfather, and by

his will appointed to such child an estate in the nature of a conditional fee, subject to forfeiture for breach of condition against alienation. *Appeal of Pepper*, 702.

PROCESS.

1. **PROCESS—NOTICE BY PUBLICATION.** — Action to cancel a deed as fraudulent is a suit for the establishment of a right to or against real estate, so as to allow notice to non-resident defendants by publication of summons, provided by section 3494, Revised Statutes of Missouri. *Adams v. Cowles*, 74.
2. **PROCESS—NOTICE BY PUBLICATION.** — In action to cancel a deed as fraudulent, and to obtain title to the land, notice to non-resident defendants by publication of summons is sufficient under the statute, if it describes the land, and states the object of the suit, especially when collaterally attacked. *Id.*
3. **OFFICER MAY LAWFULLY STOP RAILWAY TRAIN FOR PURPOSE OF ARRESTING ITS ENGINEER**, where the officer has in his hands a writ by which he is commanded to arrest the body of such engineer. *Johnsbury etc. R. R. Co. v. Hunt*, 138.
4. **REGULARLY, RETURN OF PROCESS SHOULD BE MADE** in the name of the sheriff by the deputy, and whether a return by the deputy in his own name is sufficient, *quære*. *Brickhouse v. Sutton*, 497.

PUBLIC POLICY.

See CONTRACTS, 5-8.

RAILROADS.

1. **TORT—LEASED RAILROAD.** — Railroad company over a section of whose track another company runs its trains, by virtue of a contract, is liable in tort to the latter's brakeman, who, without the fault of himself or of his co-employees, receives a personal injury while in the performance of his duty on his employer's train, solely by reason of the negligent construction of the former's depot. *Nugent v. Boston etc. R. R. Co.*, 151.
2. **LIABILITY OF LESSOR OF RAILROAD FOR NEGLIGENCE OF LESSEE.** — An authorized lease without any exemption clause absolves the lessor from the torts of the lessee, resulting from the negligent operation and handling of its trains, and the general management of the leased road over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station-houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility. *Id.*
3. **RAILROAD.—COVENANT FROM LESSOR TO KEEP ROAD IN ORDER AND REPAIR**, or to "save the lessor harmless," while it may afford a means of indemnity to the lessor, does not shield him from responsibility. *Id.*
4. **WALKING ON TRACK OF RAILROAD IS NOT, IN ITSELF**, such contributory negligence as will bar a recovery of damages for injuries sustained through the negligence of the company's servants. *Troy v. Cape Fear etc. R. R. Co.*, 522.
5. **ALTHOUGH PERSON WALKING ON TRACK OF RAILROAD COMPANY MAY BE TECHNICALLY A TRESPASSER**, yet if he uses due care to avoid injury from the wrongful act of the company, he may recover damages for injuries thereby sustained. *Id.*

6. **RAILROAD COMPANY — LICENSE TO CROSS TRACK.** — When, for a series of years, the public has been in the habit of crossing the track of a railroad company, the acquiescence of the company in the public use will amount to a license, and imposes on it the duty to exercise reasonable care in the operation of its trains, so as to protect those using the license from injury. *Id.*
7. **DUTY IS ALWAYS IMPOSED ON THOSE IN CHARGE** of a railway train in motion to keep a reasonable lookout, and a failure to do so will render the company liable for injuries resulting even to a trespasser who has not been guilty of contributory negligence. And although the person injured was guilty of contributory negligence, yet if the defendant might have avoided the injury by ordinary care, and did not, damages are recoverable. *Id.*
8. **GREATER CARE IS REQUIRED OF RAILROAD COMPANY** than is otherwise necessary in running its trains in a populous town, and especially when a train is running out of time or at an unusual hour. *Id.*
9. **RECOVERY OF DAMAGES FOR INJURY CAUSED BY NEGLIGENCE** of railroad company is restricted to actual damages. *Id.*

See COMMON CARRIERS.

RECEIVERS.

1. **RECEIVER, WHEN LIABLE FOR LOSS OF MONEY IN HIS CUSTODY.** — When money is in the hands of a receiver at the place of final custody, and he has no further duty in respect to it except to preserve it, it is already in court, and he cannot part with his custody of it by depositing it in bank, save at his own risk, without some order, leave, or direction authorizing him so to do. *Ricks v. Broyles*, 280.
2. **COURT OF EQUITY IN GEORGIA HAS NO OFFICIAL BANKER**, and no bank but its receiver. *Id.*
3. **GENERAL DEPOSIT OF MONEY IN BANK BY RECEIVER IS LOAN**, and transforms the fund into a chose in action. *Id.*

REFEREES.

- CLAUDE WILL NOT BE REMANDED TO REFEREE FOR REVISION OF HIS FINDINGS** as to a certain point, which, it is alleged, was not regarded as very important by counsel, nor given much prominence on the trial, when the record shows that the point was brought to the attention of the referee by both sides, and discussed by the court below. *Palmer v. St. Albans*, 125.

RELEASE.

1. **HEIR AT LAW MAY RELEASE TO HIS FATHER**, for a sufficient consideration, all the share which he would otherwise acquire in the latter's estate on his death; and such release will estop such heir from claiming any interest in as one of the heirs at law of his father. *Brands v. De Witt*, 909.
2. **STATUTE OF FRAUDS. — RELEASE MUST BE IN WRITING** when by it an heir at law relinquishes all right to claim the estate which otherwise would vest in him on the subsequent death of his ancestor. *Id.*

See Co-TENANCY, 7.

RELIGIOUS LIBERTY.

See CONSTITUTIONAL LAW.

REMOVAL OF CAUSES.

1. UNDER ACT OF CONGRESS, MARCH 3, 1887, AMENDATORY of that of March 3, 1875, an application by a defendant to have an action removed from the state court to the United States circuit court is properly refused, unless the action is one of which the latter court has original jurisdiction. *McNeal etc. Co. v. Howland*, 513.
2. PROPER CASE FOR REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT HAVING BEEN MADE OUT, no formal order of removal is necessary. All that is required of the state court is simply a suspension of further proceedings, unless thereafter the cause should be remanded by the federal court for a resumption of jurisdiction. *Id.*

REPLEVIN.

LOST PROPERTY. — A STRANDED SAW-LOG, WHICH IS UNMARKED, and has been lying unreclaimed among the rocks and drifts for more than two years, is lost property; and where the defendant, by his agents, takes possession of such property, this right of possession is not so lost by the log subsequently drifting upon the land of a riparian proprietor as to enable the latter, as special bailee of the true owner, to maintain replevin therefor against such defendant. *Dederick v. Oulds*, 812.

RESCISSION.

See CONTRACTS, 9, 10.

SALES.

1. DURESS INVALIDATES CONTRACT FOR SALE OF PROPERTY where the free will of one of the parties is constrained, and his consent is induced by threats of the other party to do him bodily injury, and the party whose consent has been procured by duress cannot be convicted of larceny for subsequently removing the property alleged to have been sold by him. *Love v. State*, 234.
2. TO VEST TITLE UNDER CONTRACT OF SALE OF PERSONAL PROPERTY, the agreement must ascertain the precise article to be delivered, the price must be agreed or paid, and where the quantity is to be taken from a bulk, it must be set apart and delivered, or there must be an agreement to consider it as belonging to and held for the purchaser. One who has entered into a merely executory contract for the sale of property, without having parted with the title thereto, cannot be convicted for stealing the property. *Id.*
3. FRAUDULENT PURCHASE OF GOODS. — WHERE ONE, THROUGH FRAUD, EFFECTS the purchase of goods, and places them in the hands of an auctioneer for sale, and the latter, in good faith, advances money upon them, or incurs expenses in relation to them, he acquires title to the goods, and is entitled to the protection of a *bona fide* purchaser against the claim of the original defrauded vendor. But he is not entitled to such protection if, at the time the goods were delivered to him, he had knowledge of circumstances calculated to put a man of ordinary prudence on inquiry as to whether the party who intrusted the goods to him was perpetrating a fraud in selling them by auction, and he failed to make the inquiry into the character of the transaction. *Higgins v. Lodge*, 437.
4. IF, IN ANY PURCHASE, THERE BE CIRCUMSTANCES WHICH, IN EXERCISE OF COMMON REASON AND PRUDENCE, ought to put one upon particular

inquiry, he will be presumed to have made that inquiry, and will be charged with notice of every fact which that inquiry would give him. *Id.*

5. EVIDENCE OF CIRCUMSTANCES WARRANTING JURY in the particular case in finding a fraudulent purchase of goods. *Id.*
6. BONA FIDE PURCHASER OF GOODS, WITHOUT NOTICE OF CONDITION upon which his vendor has acquired the possession, will be protected against the claim of the original vendor, in the same manner where the sale and delivery are conditional as where the possession has been obtained by fraud. *Lincoln v. Quynn*, 446.
7. TITLE OF MORTGAGEE WITHOUT NOTICE OF CONDITIONS. — WHERE GOODS ARE SOLD ON CONDITION THAT TITLE SHOULD NOT VEST in the vendee until the price should be paid in full, by monthly installments, and before payment of the purchase-money in full the vendee mortgages the goods to one having no notice of the terms of the conditional sale, the title of such mortgagee must be sustained against the claim of the original vendor. But the rule is otherwise if the mortgagee had information which fairly put him upon inquiry, in which case he is chargeable with notice of every fact which that inquiry would have ascertained. *Id.*
8. COURT OF EQUITY WILL NOT ENFORCE STIPULATION in a contract of sale that on default by the vendee in any of the credit payments, the vendor might reclaim and take possession of the goods, and that all previous payments should be forfeited. *Id.*
9. SALE OF PART OF LARGER NUMBER OF ARTICLES OF PERSONAL PROPERTY, NOT DISTINGUISHABLE upon the face of the contract, will be operative to pass title, if, at the time, they are separated and understood by the parties. *Carpenter v. Medford*, 535.
10. VERBAL AGREEMENT OR PROMISE TO EXTEND TIME FOR EXERCISE OF OPTION TO BUY, unsupported by a consideration, is a mere *nudum pactum*, and is not enforceable. It operates as a mere continuing offer until it should be withdrawn, or otherwise ended by the person making it, who is entirely at liberty at any time, before acceptance, to withdraw; and the subsequent sale and transfer of the property to a third person has the effect of at once terminating the offer. *Coleman v. Applegarth*, 417.
11. AFFIRMATIONS OF VENDOR AS TO QUALITY OF ENGINE AND BOILER SOLD BY HIM CONSTITUTE WARRANTY that they are as described, when such affirmations are relied upon as the basis of the sale, and are so understood by the vendor. *Drew v. Edmunds*, 122.
12. DEFECT IN STEAM-CHEST IS NOT LATENT, where it is readily discoverable by taking off the cover. *Id.*
13. IMPLIED WARRANTY THAT CORN IS GOOD AND SALABLE EXISTS where one to whom another has offered to sell a car-load of corn wrote that he would give a certain price per bushel for it, "provided it is good, salable corn," and the seller replied that he would accept the offer "for one car-load of corn." *Holloway v. Jacoby*, 737.
14. SELLER MAY SUE AT ONCE, WHERE BUYER REFUSES TO GIVE NOTE payable on time with security, which he agreed to give; and no demand for the note and security is necessary where the seller requests the buyer to take the property and pay for it as agreed, and the latter refuses to do so. *Foster v. Adams*, 120.

See GROWING TREES.

SEDUCTION.

See CRIMINAL LAW.

SHERIFFS.

See ATTORNEYS, 1.

SLANDER.

1. IN SLANDER, while matters averred in a special plea may be taken advantage of in a plea of not guilty, the special plea may properly be interposed where the occasion of speaking or publishing the alleged slanderous words furnishes a defense to the action. *Shadden v. McElwee*, 821.
2. A WITNESS UNDER OATH IN A JUDICIAL PROCEEDING IS, AS TO HIS STATEMENTS SO MADE, ONLY CONDITIONALLY PRIVILEGED. If one avail himself of such position to maliciously answer, with a knowledge that his answer is not pertinent or relevant, the law withdraws the protection it would otherwise afford; but malice in fact must be shown by the plaintiff in an action based on such defamatory statements. *Id.*
3. SLANDER—QUESTION FOR JURY.—The question of good faith of witness in action for slander imputed to him from using alleged defamatory words as such witness, and whether the statements were employed for the purpose of slander, is for the jury. *Id.*

SPECIFIC PERFORMANCE.

1. PAROL CONTRACT TO CONVEY LAND WILL NOT BE SPECIFICALLY ENFORCED, unless the defendant, in his answer, submits to perform the parol agreement as charged in the complaint, or unless he admits it, and neither by plea nor answer insists upon the statute of frauds. *Pitt v. Moore*, 489.
2. ALTHOUGH PAROL AGREEMENT TO SELL LAND WILL NOT BE ENFORCED, yet the party repudiating the contract will not be allowed to enjoy the benefits of permanent improvements put upon the land by one relying on the contract without compensation for the additional value arising from such improvements. *Id.*
3. SPECIFIC PERFORMANCE WILL NOT BE DECREED WHERE THE VALUE OF THE REAL PROPERTY of which a conveyance is sought is so small as to amount to little more than the usual costs of an undefended suit in chancery, unless there are some special circumstances showing that the property has a special value to the complainant. *Blake v. Flatley*, 886.

STATUTE OF FRAUDS.

1. NOTWITHSTANDING STATUTE OF FRAUDS, EVIDENCE IS ADMISSIBLE OF PAROL AGREEMENT AS TO PROCEEDS OF SALE OF LAND, although the contract for the sale of the land was in writing, if it was made subject to the agreement as an inducement to such contract. *Michael v. Foil*, 577.
 2. EVIDENCE.—Where the plaintiff has testified to a certain agreement relative to the proceeds of a sale of land, it may be shown by a third party that a certain letter relative to such sale was written to the plaintiff by the defendant, and signed by such third party, both for the purpose of corroborating the plaintiff and also to show that the defendant recognized the plaintiff as interested in the sale. *Id.*
 3. IT IS NOT ERROR TO REFUSE instructions that an agreement as to the proceeds of a sale of land is void because not in writing. *Id.*
- See GROWING TREES; MORTGAGES; RELEASE, 2; VENDOR AND VENDEE.

STATUTE OF LIMITATIONS.

1. **STATUTES OF LIMITATIONS RUN AGAINST PUBLIC CORPORATIONS**, whether they are municipal or mere agencies of the state. Such corporations are more or less branches of the government, and necessarily clothed with the attributes and incidents of sovereignty; yet when they have power to sue and be sued, to have a common seal, to take and hold property, and transact business, they are governed by the same laws and regulations, and subject to the same limitations, as natural persons. *Western Lunatic Asylum v. Miller*, 644.
 2. **STATUTES OF LIMITATIONS OPERATE AGAINST ONE STATE WHEN SUING IN THE COURTS OF ANOTHER STATE**.—If a sovereign state enters the courts of a foreign state, she does so with no other rights and immunities than those which pertain to private corporations or individuals. *Id.*
- See CO-TENANCY, 6; EXECUTORS AND ADMINISTRATORS, 3, 4; VENDOR AND VENDEE, 10.

SUBROGATION.

SUBROGATION.—DEMAND OF CREDITOR paid with money of third person, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished, and the doctrine of subrogation will be applied only when the person claiming its benefit has been compelled to pay the debt of a third person in order to protect his own rights, or to save his own property. *Buna v. Lindsay*, 48.

SURETYSHIP.

1. **SUBSTITUTION OF CO-SURETY'S NAME IN BOND**.—Where a surety signs an attachment bond on condition that a certain person, whose name is written as co-obligor therein, shall sign it as co-surety, but who, when the bond is presented to him, refuses to sign it, and his name is erased, and another's substituted therefor, without the consent or knowledge of the first surety, the fact that a certain name is on the bond is sufficient to put the parties on inquiry, and the erasure of that name and substitution of another so changes the obligation as to make it cease to be the bond of the first surety, and releases him from obligation thereon. *Hessell v. Johnson*, 334.
2. **CONDITION IN BOND**.—Surety may make any condition he chooses in signing a bond before delivery; and if a signature, required as a condition to his signing, is not put upon the bond, he is not bound by it. *Id.*
3. **SIGNATURE OF BOND IN BLANK**.—A bond required to be filed in a public office, which is signed in blank by a surety and intrusted to another to be filled out, binds the surety, and the officer, without interest in the matter, and supposed and expected to be in his office, is not bound to leave it and make personal inquiries. *Id.*
4. **PRINCIPAL AND SURETY**.—OBLIGATION OF SURETY IS NOT TO BE EXTENDED beyond what the terms of the contract fully import. *First Nat. Bank v. Gerke*, 453.
5. **IN CASE OF SURETY STANDING BOUND FOR FIDELITY OR CAPACITY** of a principal appointed to a particular office or employment, if the nature of the employment is so changed by the act of the employer that the risk of the surety is materially altered from what was contemplated by the parties at the time of entering into the bond, the surety has a right to say that his obligation does not extend to such altered state of things. *Re-*

gard must be had to the intention of the parties when the bond was executed, and whatever facts will shed light upon the question of intention may be considered in construing the bond. *Id.*

6. CHANGE IN EMPLOYMENT OF BANK CLERK from that of assistant book-keeper to note-teller involves a material increase of risk to the surety on his bond, conditioned for the honest and faithful performance of his duties as a clerk of the bank, and releases such surety from his obligation under the bond. *Id.*

See INSOLVENCY; SUBROGATION.

TAXATION.

See ADVERSE POSSESSION, 3.

TELEGRAPHS.

1. CIPHER TELEGRAMS — DAMAGES. — It is but a reasonable requirement that the importance of a cipher message, and of its speedy as well as accurate transmission, should be made known to the receiving operator, if the company is to be held responsible for serious damages. *Cannon v. Western Union Tel. Co.*, 580.
2. CONDITION THAT MESSAGE BE REPEATED. — If importance of telegram does not appear on its face, as in case of a cipher message, and a party chooses to send a single unrepeatable message, when at a small additional expense a mistake could be avoided, it should be at his own risk, in the absence of gross and inexcusable negligence on the part of the company and its servants. *Id.*
3. TELEGRAM — MEASURE OF DAMAGES. — If it be assumed that analogy exists between carriers of goods and public carriers of messages as to responsibility, it by no means follows that the loss of a bargain made, or which might have been entered into, from which profit would have resulted, can be visited in damages upon a carrier uninformed of the purpose or importance of the communication. *Id.*
4. TELEGRAPH COMPANY HAS NO AUTHORITY OR AGENCY FROM PERSON SENDING OR TO WHOM A MESSAGE IS SENT to make, modify, or alter any agreement or proposition to buy or sell contained in the message received or transmitted, or to bind a person sending or receiving such message. *Pegram v. W. U. Tel. Co.*, 557.
5. RULE OF DAMAGES FOR NEGLIGENCE IN TRANSMISSION OF TELEGRAM is, that sender is entitled to recover nominal damages, and such substantial damages as he has sustained which were naturally the proximate consequence of the wrongful act; but damages cannot be recovered which may have been the consequence of secondary and remote causes indirectly growing out of a breach of the contract. *Id.*
6. DAMAGES CANNOT BE RECOVERED FOR AMOUNT OF JUDGMENT OBTAINED BY RECEIVER OF TELEGRAM AGAINST SENDER for injury sustained by such receiver by reason of the false transmission of a message by telegraph company, although the company was notified by the sender to appear and defend that action, and to save him harmless, and the company failed so to do. *Id.*
7. RIGHT OF ACTION FOR DAMAGES AGAINST TELEGRAPH COMPANY exists in behalf of person to whom telegram is sent for his personal benefit, when through negligence of the company the telegram is not promptly transmitted and delivered. *Wadsworth v. W. U. Tel. Co.*, 864.

8. DAMAGES WHERE TELEGRAM NEGLIGENTLY FAILED TO BE DELIVERED IS FOR PERSONAL BENEFIT OF RECEIVER, AND DOES NOT INVOLVE QUESTION OF PECUNIARY LOSS. — Where a telegram was sent to a sister, containing information of the serious illness of her brother, and subsequently another one was sent informing her of his death, and by reason of the negligence of the company was not promptly delivered, and the brother was deprived of that attention at her hands which he would have received but for such negligence, and she is in consequence unable to make preparations for his funeral, she is entitled to damages for the wrong and injury done to her affections and feelings. *Id.*
9. TELEGRAPH COMPANY IS LIABLE IN DAMAGES to the party aggrieved under sections 1541 and 1542 of the Tennessee code, and the act does not discriminate between messages appertaining to matters pecuniary merely, and those where a telegram is sent for the receiver's personal benefit. *Id.*
10. TELEGRAMS. — CONDITION THAT SENDER WILL NOT CLAIM DAMAGES for errors, delays, or omissions, "happening from any cause," is unreasonable and void. Whether such conditions are reasonable or not must be determined with reference to public policy rather than private contract. *Fowler v. W. U. Tel. Co.*, 211.
11. TELEGRAPH COMPANIES ARE NOT COMMON CARRIERS in the strict sense of the term, although engaged in a public employment, and are bound to transmit for all persons messages presented to them for that purpose. *Id.*
12. TELEGRAPH COMPANIES DO NOT INSURE ABSOLUTELY THE SAFE AND ACCURATE TRANSMISSION OF MESSAGES as against all contingencies, where there is an absence of a contract or regulation modifying their liability. *Id.*
13. TELEGRAPH COMPANIES IN TRANSMITTING MESSAGES ARE BOUND TO EXERCISE ORDINARY CARE, and should be responsible for any negligence or unfaithfulness in the performance of their duties; they are bound to have suitable instruments and competent servants, and to see that the service is rendered with that degree of care and skill which the peculiar nature of the undertaking requires. *Id.*
14. LIABILITY IS NOT IMPOSED ON TELEGRAPH COMPANY IN TRANSMITTING MESSAGES for want of skill or knowledge not reasonably attainable in the art, nor for errors or imperfections which arise from causes not within its control, or which are not capable of being guarded against. *Id.*
15. EVIDENCE — BURDEN OF PROOF. — PRIMA FACIE CASE IS MADE OUT AGAINST TELEGRAPH COMPANY when it is shown that the message which the company undertook to send was not delivered, and that damage has resulted, and the burden of proof is then thrown upon the company to show the exercise of ordinary care, and that its failure to transmit and deliver the message was not caused by its fault or negligence, or that of its employees. *Id.*

THEATERS.

STATUTES — CONSTRUCTION. — PERFORMANCE OF OPERA IS THEATRICAL EXHIBITION, within the meaning of Pennsylvania act of April 16, 1845, and other subsequent acts, providing that no "theatrical exhibition" shall be allowed in this state without a license first obtained, fixing the price of such license, and providing for the manner in which it may be obtained. *Bell v. Mahn*, 786.

TRESPASS.

1. JUDGMENT IN TRESPASS AS EVIDENCE. — IN ACTION OF TRESPASS on the case for an assault and battery, to recover damages for an injury received during a controversy concerning the location and erection of a line fence, a former judgment in trespass in favor of defendant in an action brought by plaintiff's father against him for tearing down a portion of such fence is inadmissible in evidence, as such judgment is not conclusive evidence in favor of defendant, either of title to the fence, or to the land inclosed by it. It only determines his non-liability in damages for tearing the fence down, but does not establish his right to rebuild it. *Fahey v. Crotty*, 305.
2. TRESPASS — EVIDENCE OF GOOD CHARACTER INADMISSIBLE. — In an action of trespass for damages for an assault and battery, evidence of the good character of defendant is inadmissible, as his character is not in issue. *Id.*
3. IN TRESPASS FOR PERSONAL INJURY, all circumstances of the transaction may be shown under the general issue to have such effect as they deserve in determining the verdict, by mitigation or otherwise. *Sutherland v. Ingalls*, 332.
4. TRESPASS — LIABILITY FOR LAWLESSNESS OF OFFICER IN EXECUTING PROCESS. — A party employing an officer to execute lawful process can only be held liable jointly for the trespass and lawlessness of the officer in executing the process, when it is shown that he ordered or encouraged such lawlessness, and then he is liable to the extent of his own misconduct because he is actually a trespasser. *Id.*
5. TRESPASS. — One who employs another innocently for a lawful purpose is not liable for his trespasses, and not liable for aggravated and wanton wrong-doing in such damages as would be assessed against him if he sanctioned it. *Id.*
6. ONE IS NOT TRESPASSER FOR EMPLOYING OFFICER to execute lawful process. It is his right so to do, and the officer is bound to perform the duty, and cannot be blamed for doing it in a lawful manner. *Id.*
7. AGENT OF LESSORS OF PIANO, WHO OBTAINS ENTRANCE INTO LESSEE'S HOUSE BY FALSELY REPRESENTING THAT HE WANTED TO TUNE PIANO, when he intended to and did remove it, using no violence in so doing, is not guilty of a trespass, nor is the taking unlawful, when the contract between the parties provided that upon default of payment of any installment of rent the lessee should redeliver the piano to the lessors or their authorized agent, "or permit their agent to enter into and upon any premises where said piano may be, and without let or hindrance take away the same"; and no exhibition by the agent of any written authority, nor any previous demand for the piano, the installments of rent having previously been demanded, is necessary. *North v. Williams*, 695.

See CO-TENANCY, 7.

TROVER.

1. DAMAGES FOR CONVERSION OF PROPERTY, IN GOOD FAITH AND UNDER A MISTAKE AS TO ITS OWNER'S RIGHTS, are not measured by the highest market price up to the day of the trial. In such a case, the duty of the injured party is to repurchase the property in a reasonable time; and whether he does so or not, his damages cannot exceed the highest price

reached within a reasonable time after he has learned of such conversion. *Wright v. Metropolis Bank*, 356.

2. WHAT IS A REASONABLE TIME in which person whose stock has been converted by one acting in good faith should repurchase stock of like amount to fix the measure of damages is, when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, a question of law. *Id.*
3. INTENT WITH WHICH WRONGFUL ACT is done, by which a party is deprived of his property, except when malicious, is of little consequence if the act is done. It is the effect of the act which constitutes the conversion. *Gibbons v. Farwell*, 301.
4. TROVER AND CONVERSION. — WHERE ONE WRONGFULLY CONVERTS PROPERTY AT TIME UNDER LEVY on execution process, and afterwards satisfies the execution by becoming the purchaser of the judgment under which the process issued, the property is thus released from the custody of the law, and its owner is thereafter in a position to maintain trover against the wrong-doer. *McNair v. Wilcox*, 799.
5. IN ACTION FOR CONVERSION AGAINST OFFICER WHO HAD ATTACHED YACHT FOR CREDITOR OF SELLER, IT IS NO DEFENSE THAT SAME WAS UNLAWFULLY PURCHASED by the plaintiff, an inspector of customs, contrary to the Revised Statutes of the United States, section 2638, which provides, under a penalty, that no person in that branch of public service shall "own any vessel, or interest therein." The plaintiff's possession was his title against the officer. *Bles v. Winslow*, 195.

See BAILMENTS, 1; COMMON CARRIERS, 15-17.

TRUSTS.

1. TRUSTEE WILL TAKE LEGAL ESTATE IN FEE, THOUGH LIMITED TO HIM WITHOUT THE WORD "HEIRS," if the trust which he is to execute be to the *cestui que trust* and his heirs. The words of limitation must here be treated as applying to the legal as well as to the equitable estate, for to otherwise construe them would deprive the trustee of power to execute his trust. *Melick v. Pidcock*, 901.
2. A LEGAL ESTATE IS CONVERTED INTO AN EQUITABLE ONE by the statutes of New Jersey in favor of the *cestui que trust* whenever an estate is granted to one person for the use of another. *Id.*
3. PARTIES. — IN A SUIT RELATING TO THE RESIDUARY ESTATE, all persons interested in the residue must be made parties. *Read v. Patterson*, 877.
4. WHERE TRUSTEES HAVE A DISCRETION TO DO OR NOT DO A PARTICULAR THING, courts of equity will not command or prohibit the exercise of the power, if the conduct of the trustees is in good faith, and not influenced by improper motives. *Id.*
5. COURT OF EQUITY MAY MAKE AN ALLOWANCE OUT OF THE INCOME OF A TRUST ESTATE FOR THE SUPPORT OF AN INFANT CESTUI QUE TRUST, though the instrument creating the trust contains no provision for maintenance, and directs that the interest shall accumulate. In making such allowance, the court will be controlled by the amount of the infant's estate, and the expenditure required for the maintenance of the infant in his station and condition of life. *Id.*
6. DISCRETION OF A TRUSTEE RESPECTING THE AMOUNT OF INCOME TO BE APPLIED TO THE SUPPORT OF AN INFANT WILL NOT BE CONTROLLED by a court of equity if the trustee has exercised a discretion within the limit of a sound and honest execution of the trust. *Id.*

7. CONDUCT OF A TRUSTEE IN THE EXECUTION OF DISCRETIONARY POWERS will be examined by a court of equity, for the purpose of determining whether he has abused his trust by acting beyond the limits of a sound and honest execution of the trust; and the court will, in a clear case, remove the trustee and assume the execution of the trust. *Id.*

See MORTGAGES, 1; PERPETUITIES, 1.

UNINCORPORATED SOCIETIES.

1. MUTUAL AID SOCIETY. — ACTION AT LAW WILL LIE AGAINST MUTUAL AID SOCIETY FOR FAILURE TO MAKE ASSESSMENT to pay benefits as stipulated in the certificate of membership, upon a declaration alleging, with other proper averments, a failure to make the assessment, and averring that if such assessment had been duly made it would have resulted in the collection of the maximum sum payable under the certificate, and claiming that sum as damages for such failure, and the plaintiff would be entitled to recover what, upon proof, he could show such assessment would have yielded if it had been duly made. *Earnshaw v. Sun Mut. A. Soc.*, 460.
2. CONTRACT LIMITATION. — WHERE CERTIFICATE OF MEMBERSHIP OF MUTUAL AID SOCIETY PROVIDES that suit for the recovery of any claim under the certificate must be commenced within six months after the death of the assured, and that failure to commence such suit within the time specified would be a waiver of all rights and claims under the certificate, and within that time an injunction enjoining payment to the beneficiary prevents him from bringing suit until after the expiration of the six months, such contract bar is absolutely removed, and cannot be revived, and suit may be brought at any time within the period prescribed by statute. *Id.*

VENDOR AND VENDEE.

1. UNILATERAL CONTRACT IN WRITING SIMPLY GIVING OPTION to purchase land within a specified time, for a given price, is binding upon the party only who signs it, and is binding upon him only for the time stipulated for the exercise of the option. *Coleman v. Applegarth*, 417.
2. DOCTRINE OF REASONABLE TIME APPLIES TO AN AGREEMENT AS TO THE PROCEEDS OF A SALE OF LAND where no time is specified; and when it is stated in such agreement that the land should be sold within the plaintiff's "lifetime," it should not be limited to a shorter time. *Michael v. Foll*, 577.
3. ABSENCE OF WORDS OF INHERITANCE IN EXECUTORY CONTRACT TO CONVEY LAND WILL NOT PREVENT PASSING OF FEE, but equity will supply the words where the consideration paid or other circumstances evince that no less than a fee was intended; although in a conveyance the word "heirs" is a term of art, and indispensable to carry a fee. *Phillips v. Swank*, 691.
4. CONSTRUCTION OF INFORMAL INSTRUMENT, TRANSFERRING INTEREST IN REAL ESTATE, AS CONVEYANCE, OR AS EXECUTORY AGREEMENT TO CONVEY ONLY, depends, not upon any particular words and phrases it may contain, but upon the intention of the parties, derived from the instrument itself, and when that is doubtful, from the circumstances attending its execution; and in determining this intention, the first rule is to inquire whether the language imports a present conveyance, or contemplates a further assurance to pass the title. *Id.*

5. INSTRUMENT IS TO BE CONSTRUED AS EXECUTORY AGREEMENT TO CONVEY, where the owner of land dated and signed a writing, not under seal, to the effect that "i do herby agree tht Jonathan Phillips shall have the land wich he is posetion of now for labor he don for me over age and this shall be his wrecept for all my writes and claims against the land." *Id.*
6. WRITTEN CONTRACT TO CONVEY LAND, TO SATISFY STATUTE OF FRAUDS, MUST BE IN SOME SENSE SUSTAINING; but it is sufficient if the land be described as that which the vendee "is in possession of now." *Id.*
7. VENDOR'S INTEREST IN LANDS CONTRACTED TO BE SOLD IS BOUND BY LIEN OF JUDGMENT recovered against him while the contract is unexecuted, to the extent to which it is unexecuted. *Kinports v. Boynton*, 706.
8. ASSIGNMENT BY VENDOR OF LANDS IS IN LEGAL EFFECT MORTGAGE, leaving in him a right of redemption, when it is of his claim for the unpaid purchase-money of the lands contracted to be sold, "together with all my interest and legal estate in the land," as collateral security merely. *Id.*
9. VENDOR'S RIGHT OF REDEMPTION IS BOUND BY LIEN OF JUDGMENT subsequently recovered against him, where he makes a contract to convey the lands, and assigns his claim for the unpaid purchase-money, "together with all my interest and legal estate in the land," as collateral security, thus creating a mortgage. *Id.*
10. MERE RECOVERY OF JUDGMENT BY VENDOR AGAINST VENDEE IN EJECTMENT TO ENFORCE CONTRACT FOR SALE OF LANDS DOES NOT RENDER VENDEE'S POSSESSION THEREAFTER ADVERSE and hostile to the vendor, so as to set in motion the statute of limitations, no proceedings having been taken to enforce the judgment. *Bennett v. Morrison*, 711.

See SPECIFIC PERFORMANCE; STATUTE OF FRAUDS.

WAREHOUSEMEN.

BAILLES—DEGREE OF CARE. — WAREHOUSEMAN HOLDING GOODS OF ANOTHER AT HIS REQUEST AND WITHOUT PROFIT is not, in case of imminent danger from fire to warehouse in which they are stored together with other goods, bound to act upon the suggestion of the owner as to the best means of saving the goods. If an honest and reasonable effort is made in good faith by the warehouseman and his servants, suggested at the time as the best line of action to be pursued, it exonerates him from liability for loss, although it subsequently appears that a different course would have been better. *Turrentine v. Wilmington etc. R. R. Co.*, 602.

WARRANTY.

See SALES, 8, 9.

WATERS.

1. RULE FOR DISTRIBUTION OF ALLUVIAL ACCRETION FORMED ON LANDS BORDERING ON UNNAVIGABLE RIVER, owned by coterminous proprietors, is to extend the side lines of each owner to the nearest river bank, giving to each that part of the accretion formed in front of his own land. *Hubbard v. Manwell*, 110.
2. NAVIGABLE WATERS. — Although rivers, lakes, etc., are not strictly public waters, yet if they are navigable in fact the public have a right to their use. Such waters are treated as *publici juris* in so far as they may be properly used for the purposes of navigation in their natural state. *State v. Narrows I. Club*, 618.

3. **OWNER OF BED TO RIVER, ETC., NAVIGABLE IN FACT** may use the land and whatever is incident to it, including water over it, in any lawful way, but may not in so doing impede or materially interfere with navigation. *Id.*
4. **INDICTMENT FOR OBSTRUCTING NAVIGABLE WATERCOURSE** must charge that such obstruction was not "for the purpose of utilizing," etc., where statute prohibits the willful obstructing such waters, "except for the purpose of utilizing water as a motive power." But obstructing waters navigable in fact is indictable at common law, however, under the common-law form. *Id.*
5. **EVIDENCE.** — IT IS NOT NECESSARY THAT OBSTRUCTIONS IN THE WAY OF NAVIGATION SHOULD HAVE ACTUALLY INTERFERED WITH OR DONE IT INJURY TO RENDER THEM A NUISANCE; it is sufficient if navigation was thereby rendered less convenient, secure, and expeditious. So iron posts set in bed of navigable river may obstruct navigation, although no vessel has sustained actual injury therefrom; and evidence that some particular vessel had suffered harm is not required. *Id.*

See EASEMENTS, 1, 2.

WAYS.

See INJUNCTIONS, 1.

WILLS.

1. **SUBSCRIBING WITNESSES TO A WILL MUST SEE THE TESTATOR'S SIGNATURE** at the time when they attest it. It is not sufficient for him to send for the witnesses, explain that he wanted them to sign his will, and obtain their signatures as attesting witnesses, if the will is so folded that they cannot see whether he has signed it or not. *In re Mackay*, 409.
2. **CONSTRUCTION.** — A devise to testator's wife "as long as she shall remain unmarried and my widow, but on her decease or marriage, then what may remain I give and devise to my son, C. H. In case my son, C. H., should die without children, then, after my wife's death and my son's death, to A. S., my brother's son," gives to C. H., on the testator's decease, a vested remainder in fee, limited upon the life estate of his mother, subject to be defeated by his death without children, in which event the remainder vests in the testator's nephew, A. S. *Avery v. Everett*, 368.
3. **GENERAL WORDS IN WILL, FOLLOWING AFTER AND COUPLED WITH WORDS OF LIMITED SIGNIFICATION**, are restricted to the same class of things as the former, except where such general words are in a residuary clause. The clause, "All my personal goods and chattels on said premises at the time of my decease," will not therefore pass promissory notes and money of the testatrix on the premises at the time of her decease, the clause being preceded by the words, "with my household furniture," there being also a residuary clause in the will, and the amount of money and notes kept on the premises not being definite, but often varying with varying circumstances. *Peasley v. Fletcher*, 103.
4. **PAROL EVIDENCE ALIENDE THE WILL** is admissible for the purpose of showing that certain of the testator's children, who did not receive anything under the will, were intentionally omitted. *Whittemore v. Russell*, 200.

5. **CONSTRUCTION OF WILL — LIFE ESTATE — AUTHORITY TO SELL.** — A wife takes only a life estate in the realty, with a gift over, under a clause of a will which provides as follows: "I give to my wife the use and remainder of my property, both real and personal, during her natural lifetime, and after her decease it is to be equally divided between my children; the real estate to be sold, if thought advisable"; and the last clause, providing for a sale of real estate, is not effective, no power of sale having been conferred by the testator on the executor or any trustee, but the land can be sold only by the persons to whom it belongs. *Id.*
6. **WILL — WHETHER GIFT OF PERSONAL PROPERTY FOR A LIFETIME, WITH A GIFT OVER, IS ABSOLUTE OR OTHERWISE** depends upon the nature of the property, as to its being perishable, or merely of articles which may depreciate by using, and also upon other circumstances. Where the use of money is given, the gift is of the interest only, and security must be given, or a trustee appointed, of whom a bond would be required. All rules may be changed, according to circumstances, as a court of equity may deem proper. *Id.*
7. **DEVISE TO NATURAL DAUGHTER OF TESTATOR, AND TO HER ILLEGITIMATE CHILDREN** by a deceased friend of the testator, is not illegal, nor is it made so by any illicit intercourse between said daughter and one of the testator's executors, when there is no proof to charge the testator with knowledge of such intercourse, or to show that he in any way encouraged or promoted it, and where his will makes no provision for the carrying on of such intercourse, or for the maintenance of any offspring that might result therefrom. *Smith v. Du Boe*, 260.
8. **WILL CANNOT BE SET ASIDE FOR ALLEGED MISREPRESENTATIONS**, unless the representations are proved to have been false; and for the court to so charge the jury is not error. But to charge in addition that the representations must be proved to have been made in bad faith, and for the purpose of procuring the will, is erroneous. Where, however, the issue actually presented in the case was, whether or not the representations were false, where other portions of the charge limited and explained this instruction, where the court instructed the jury that if the representations were false the will should be set aside and declared void, and where the evidence in the case proved that the representations were not false, the verdict will not be set aside on that account, it being altogether probable that the jury could not have been misled or confused by the use of the terms employed. *Id.*
9. **WILL — CONTINGENT LIMITATIONS — PARTITION.** — Where testatrix devised land to certain of her children, with a provision that upon the death of either without heirs the portion of the child so dying should go to the survivor, the time when the contingency is to happen is the death of the respective devisees without an heir, — that is, without children then living, — and no earlier period, and the estate should then go to the survivor; and where it was also provided that in case of the marriage of either, then there should be a division of the estate, the postponed division shows that it was not the intention of the testatrix to confine the contingency to the period of her own life. *Williams v. Lewis*, 574.
10. **WILL — ESTOPPEL BY PARTITION — CONTINGENT LIMITATIONS.** — Where land is devised to children of the testatrix to hold equally until certain contingencies, upon the happening of which a division was to be had, and also upon a contingent limitation that upon the death of one without heirs that portion was to go to the survivor, a judgment of partition

does not estop the survivor from claiming his share upon happening of the contingent limitation. The partition separates into parts that which was before held in common as a whole, and no more disturbs the limitations than would have done a devise of the several portions to the respective tenants by the testatrix. *Id.*

11. WILL. — WHERE A TESTAMENTARY GIFT IS MADE BY HUSBAND TO WIFE IN SATISFACTION OF HER WAIVER OF DOWER in his estate, the gift has a preference over all other unpreferred legacies; but the general rule does not prevail, if the will clearly disclose that the testator intended that such gift should not have a preference over other bequests. *Moore v. Alden*, 203.
12. ID. — WHERE SUCH GIFT WAS AN ANNUITY for life to the widow, unconditional and absolute, but the testator had over-estimated the sources of supply upon which its payment depended, the full annuity must be paid her as long as the estate lasts; the source indicated failing, others must supply the deficiency. *Id.*
13. UPON BILL IN EQUITY FOR CONSTRUCTION OF WILL, ALLOWANCES FOR THE EXPENSE OF PROFESSIONAL SERVICES AND DISBURSEMENTS may, to a moderate amount, be thrown upon the estate, unless the case be frivolous and unnecessary. *Id.*
14. WILL IS PRESUMED TO HAVE BEEN DESTROYED, WITH INTENT TO REVOKE IT, from proof that it cannot be found after testator's death. *Collyer v. Collyer*, 405.
15. ONE WHO SEEKS TO ESTABLISH A LOST OR DESTROYED WILL ASSUMES THE BURDEN of overcoming by adequate proof the presumption that it has been destroyed, *animo revocandi*. *Id.*
16. PRESUMPTION THAT A WILL WHICH CANNOT BE FOUND WAS DESTROYED ANIMO REVOCANDI IS NOT OVERCOME by proof that persons injuriously affected by the will had opportunities to destroy it. The facts and circumstances must be sufficient to establish that the will was actually fraudulently destroyed. *Id.*
17. COSTS AGAINST THE UNSUCCESSFUL PROPONENT OF A WILL may be awarded, in the discretion of the surrogate, under the statutes of New York. *Id.*
See PERPETUITIES.

WITNESSES.

1. HUSBAND CONSENTS TO HIS WIFE'S BEING WITNESS when he offers in evidence a deed witnessed by her. *Tillotson v. Prichard*, 95.
2. PLAN OF LANDS, THOUGH IN PART COPY OF GOVERNMENT SURVEY, MAY BE USED ON TRIAL by a surveyor testifying as a witness. *Id.*
3. HUSBAND OR WIFE MAY, UNDER THE STATUTES OF WEST VIRGINIA, GIVE EVIDENCE FOR OR AGAINST EACH OTHER in any civil action or proceeding, except that neither may disclose any confidential communication made to him or her during marriage. *Pickens v. Knisely*, 622.
4. PARTY CONSENTING THAT WITNESS TESTIFY TO CONFIDENTIAL AND PRIVILEGED COMMUNICATIONS on direct and cross examination cannot thereafter have the evidence struck out on the ground that it related to a confidential communication. *Parkhurst v. Berdell*, 384.
5. CONFIDENTIAL COMMUNICATIONS BETWEEN HUSBAND AND WIFE WHEN ALONE, which the code of New York prohibits either from testifying to, are such only as are of a confidential nature, and are induced by the marital relation, and do not include ordinary conversations relating to matters of business. *Id.*

6. IN WRIT OF ENTRY, PLAINTIFF IS COMPETENT WITNESS who demands title in his own right as an heir at law, where he is not made a party as "heir of a deceased party": R. S. Me., c. 82, sec. 98. *Johnson v. Merithew*, 162.
 7. WITNESS, WILLFULLY FALSE TESTIMONY BY, MAY BE DISREGARDED. — Where witness willfully swears falsely to any material matter, the jury may disregard the whole of his evidence. *Owens v. Kansas City etc. Ry Co.*, 39.
 8. CREDIBILITY OF WITNESS. — INSTRUCTION that if the jury believe that any witness has knowingly testified falsely to any material fact they may disregard the whole of his testimony, should not be given as a matter of course in any case; but whether it should be given or not always rests in the sound discretion of the court. *State v. Hickam*, 54.
- See ACKNOWLEDGMENTS, 2; ATTORNEYS AT LAW, 3; EVIDENCE, 8, 10-12.

WRIT OF ENTRY.

SPECIFIC OR UNDIVIDED PART OF THE PREMISES, although less than that demanded, may be recovered under the Revised Statutes of Maine, chapter 104, section 10. *Johnson v. Merithew*, 162.

